

E-filing

PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Name Jimenez, Jose L.
 (Last) (First) (Initial)

Prisoner Number E-49850

Institutional Address P.O. Box 689, Soledad, CA 93960

Correctional Training Facility - Central

**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

JOSE LUIS JIMENEZ,
 (Enter the full name of plaintiff in this action.)

vs.

B. CURRY, Warden, et al.,

(Enter the full name of respondent(s) or jailor in this action)

CV

08

2551

Case No. _____
 (To be provided by the clerk of court)

PETITION FOR A WRIT OF HABEAS CORPUS

(PR)

Read Comments Carefully Before Filling In

When and Where to File

You should file in the Northern District if you were convicted and sentenced in one of these counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in this district if you are challenging the manner in which your sentence is being executed, such as loss of good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).

If you are challenging your conviction or sentence and you were not convicted and sentenced in one of the above-named fifteen counties, your petition will likely be transferred to the United States District Court for the district in which the state court that convicted and sentenced you is located. If you are challenging the execution of your sentence and you are not in prison in one of these counties, your petition will likely be transferred to the district court for the district that includes the institution where you are confined. Habeas L.R. 2254-3(b).

1 Who to Name as Respondent

2 You must name the person in whose actual custody you are. This usually means the Warden or
 3 jailor. Do not name the State of California, a city, a county or the superior court of the county in which
 4 you are imprisoned or by whom you were convicted and sentenced. These are not proper
 5 respondents.

6 If you are not presently in custody pursuant to the state judgment against which you seek relief
 7 but may be subject to such custody in the future (e.g., detainees), you must name the person in whose
 8 custody you are now and the Attorney General of the state in which the judgment you seek to attack
 9 was entered.

10 A. INFORMATION ABOUT YOUR CONVICTION AND SENTENCE

11 1. What sentence are you challenging in this petition?

12 (a) Name and location of court that imposed sentence (for example; Alameda
 13 County Superior Court, Oakland):

14 Los Angeles County Superior Ct. Los Angeles, CA 90012

15 Court Location

16 (b) Case number, if known A032130

17 (c) Date and terms of sentence 4-3-86 , 15-years-to-Life

18 (d) Are you now in custody serving this term? (Custody means being in jail, on
 19 parole or probation, etc.) Yes XXX No

20 Where?

21 Name of Institution: Correctional Training Facility

22 Address: P.O. Box 686, Soledad, CA 93960-0686

23 2. For what crime were you given this sentence? (If your petition challenges a sentence for
 24 more than one crime, list each crime separately using Penal Code numbers if known. If you are
 25 challenging more than one sentence, you should file a different petition for each sentence.)

26 Homicide of the second degree

27
 28 § 187

3. Did you have any of the following?

Arrestment: Yes XX No

Preliminary Hearing: Yes xx No

Motion to Suppress: Yes _____ No xx

4. How did you plead?

Guilty _____ Not Guilty XX Nolo Contendere _____

Any other plea (specify) _____

5. If you went to trial, what kind of trial did you have?

Jury XX Judge alone _____ Judge alone on a transcript _____

6. Did you testify at your trial? Yes XX No

7. Did you have an attorney at the following proceedings:

(a) Arraignment Yes X No

(b) Preliminary hearing Yes X No _____

(c) Time of plea Yes x No _____

(d) Trial Yes X No _____

(e) Sentencing Yes x No

(f) Appeal Yes X No

(g) Other post-conviction proceeding Yes _____ No XX

8. Did you appeal your conviction? Yes X No

(a) If you did, to what court(s) did you appeal?

Court of Appeal Yes X No

Year: _____ Result: N/A

Supreme Court of California Yes X No

Year: _____ Result: **N/A**

Any other court Yes _____ No XX

Year: _____ Result: _____

(b) If you appealed, were the grounds the same as those that you are raising in this

petition? Yes _____ No XX

(c) Was there an opinion? Yes XX No _____

(d) Did you seek permission to file a late appeal under Rule 31(a)?
Yes _____ No XX

If you did, give the name of the court and the result:

9. Other than appeals, have you previously filed any petitions, applications or motions with respect to this conviction in any court, state or federal? Yes XX No _____

[Note: If you previously filed a petition for a writ of habeas corpus in federal court that challenged the same conviction you are challenging now and if that petition was denied or dismissed with prejudice, you must first file a motion in the United States Court of Appeals for the Ninth Circuit for an order authorizing the district court to consider this petition. You may not file a second or subsequent federal habeas petition without first obtaining such an order from the Ninth Circuit. 28 U.S.C. §§ 2244(b).]

(a) If you sought relief in any proceeding other than an appeal, answer the following questions for each proceeding. Attach extra paper if you need more space.

I. Name of Court: Los Angeles County Superior Court

Type of Proceeding: habeas corpus petition

Grounds raised (Be brief but specific):

a. state/federal denial of due process

b. state/federal denial of equal protection

c. _____

d. _____

Result: petition denied Date of Result: 1/9/08

II. Name of Court: Second Dist. Court of Appeals/Div

Type of Proceeding: habeas corpus petition

Grounds raised (Be brief but specific):

1 a. (See attached)

2 b.

3 c.

4 d.

5 Result: denied Date of Result: 2/15/08

6 III. Name of Court: California Supreme Court

7 Type of Proceeding: Petition for Review

8 Grounds raised (Be brief but specific):

9 a. (See attached copy of writ and Exhibits)

10 b.

11 c.

12 d.

13 Result: denied Date of Result: 4/23/08

14 IV. Name of Court: _____

15 Type of Proceeding: _____

16 Grounds raised (Be brief but specific):

17 a. _____

18 b. _____

19 c. _____

20 d. _____

21 Result: _____ Date of Result: _____

22 (b) Is any petition, appeal or other post-conviction proceeding now pending in any court?

23 Yes _____ No XXC

24 Name and location of court: _____

25 B. GROUNDS FOR RELIEF

26 State briefly every reason that you believe you are being confined unlawfully. Give facts to
27 support each claim. For example, what legal right or privilege were you denied? What happened?

28 Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if you

1 need more space. Answer the same questions for each claim.

2 [Note: You must present ALL your claims in your first federal habeas petition. Subsequent
3 petitions may be dismissed without review on the merits. 28 U.S.C. §§ 2244(b); McCleskey v. Zant,
4 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).]

5 Claim One: _____

6 **PLEASE SEE ATTACHED PAPERWORK**

7 Supporting Facts: _____

8 _____

9 _____

10 _____

11 Claim Two: _____

12 _____

13 Supporting Facts: _____

14 _____

15 _____

16 _____

17 Claim Three: _____

18 _____

19 Supporting Facts: _____

20 _____

21 _____

22 _____

23 If any of these grounds was not previously presented to any other court, state briefly which
24 grounds were not presented and why:

25 **ALL ISSUES ALLEGED HEREIN ARE FULLY EXHAUSTED**

26 _____

27 _____

28 _____

1 List, by name and citation only, any cases that you think are close factually to yours so that they
2 are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning
3 of these cases:

4 Martin v. Marshall (N.D. Cal. 2006) 431 F.Supp.2d 1038

5 Rosenkrantz v. Marshall (C.D. Cal. 2006) 444 F.Supp.2d 1063

6 In re Scott (2005) 133 Cal.App.4th 573

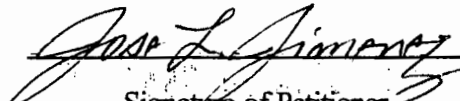
7 Do you have an attorney for this petition? Yes _____ No X

8 If you do, give the name and address of your attorney:

9 _____
10 WHEREFORE, petitioner prays that the Court grant petitioner relief to which s/he may be entitled in
11 this proceeding. I verify under penalty of perjury that the foregoing is true and correct.

12
13 Executed on May 12, 2008.

14 Date


Signature of Petitioner

15
16
17
18
19
20 (Rev. 6/02).

ATTACHMENT

• This petition concerns:

☐ A conviction

☒ Parole

☐ A sentence

☐ Credits

☐ Jail or prison conditions

☐ Prison discipline

☒ Other (specify): federal denial of due process, equal protection, sufficiency of evidence

1. Your name: Jose Jimenez

2. Where are you incarcerated? CTF-Central

3. Why are you in custody? ☒ Criminal Conviction ☐ Civil Commitment

Answer subdivisions a. through i. to the best of your ability.

a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").

Homicide of the second degree

b. Penal or other code sections: Penal Code § 187

c. Name and location of sentencing or committing court: Los Angeles County Superior Court,
210 W. Temple St., L.A., CA 90012

d. Case number: A032130

e. Date convicted or committed: March 27, 1990

f. Date sentenced: April 03, 1986

g. Length of sentence: fifteen (15) years to Life

h. When do you expect to be released? unknown; M.E.P.D. was on April 19, 1997

i. Were you represented by counsel in the trial court? ☒ Yes. ☐ No. If yes, state the attorney's name and address:

Los Angeles County Public Defender's Office

4. What was the LAST plea you entered? (check one)

☒ Not guilty ☐ Guilty ☐ Nolo Contendere ☐ Other: _____

5. If you pleaded not guilty, what kind of trial did you have?

☒ Jury ☐ Judge without a jury ☐ Submitted on transcript ☐ Awaiting trial

6. GROUNDS FOR RELIEF

Ground 1: State briefly the ground on which you base your claim for relief. For example, "the trial court imposed an illegal enhancement." (If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page four. For additional grounds, make copies of page four and number the additional grounds in order.)

PETITIONER'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION WERE VIOLATED BY RESPONDENTS WHEN THEY DENIED TO HIM THE INDIVIDUALIZED CONSIDERATIONS MANDATED AND REQUIRED BY STATUTORY AUTHORITIES AND ALL THE CLEARLY ESTABLISHED FEDERAL LAWS.

a. Supporting facts:

Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts upon which your conviction is based. *If necessary, attach additional pages.* CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is: *who* did exactly *what* to violate your rights at what time (*when*) or place (*where*). (If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)

On April 12, 2007, Jose L. Jimenez (Petitioner), appeared before the Board of Parole Hearings (BPH) for his 5th subsequent hearing (6th overall), during which Ms. J. Eng was Presiding Commissioner and Mr. J. Martin was Deputy Commissioner. A copy of the Hearing transcript is attached hereto as Exhibit "A", and incorporated by reference to bolster a claim of a "no parole" policy and/or practice which has been found to be patently unconstitutional by numerous state and federal courts that have ruled on the matter.

Petitioner was represented by Ms. M. Tardiff. A staff psychologist, Dr. E. Hewchuck, Ph.D., testified utilizing a filed Report dated: 7-26-05, that in his opinion Petitioner is NOT a risk of CURRENT danger to the public safety. A copy of that Report and Reports of 1996, 1998 and 2002 are attached as Exhibit "B". A copy of the 2007 Counselor's

(continued on attached pages)

b. Supporting cases, rules, or other authority (optional):

(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

(SEE ATTACHED POINTS AND AUTHORITIES)

I

(continued from previous page):

Report is attached as Exhibit "C" and was prepared and filed but not cited to at the Hearing.

It should be noted that a current psychological evaluation was done by a forensic specialist from Sacramento but was not made available before the Hearing and HAS NOT, as of this writing, been received by petitioner as mandated by statute. Copies of the 2005, 2003 and 2001 BPT Decisions denying parole are attached hereto as Exhibit "D" and are clearly anecdotal evidence to further advance the allegation of a "no parole" policy and/or practice that has been held to be unconstitutional as well as illegal by all courts that have ruled on the subject matter and, with the Court's leave, are also incorporated by reference to this pleading as though fully set forth herein. This allegation of a "no parole" policy and/or practice is not idle nor wishful thinking but is fully documented after many months of discovery conducted in a group of cases out of Santa Clara county: In re Lewis, et al., case no. 68038, a copy of that Order is attached as Exhibit "E".

Also present at the hearing was Mr. D. Eastman, d.d.a., from Los Angeles county, parole division.

Parole statutes and regulations bestow on life prisoners a liberty interest in parole protected by due process. McQuillen v. Duncan (9th Cir. 2002) 306 F.3d 895, 901-903; In re Rosenkrantz¹ (2002) 29 Cal.4th 616, 661 [Rosenkrantz V]. Petitioner's liberty interest required the BPH panel to find him suitable for parole and set his prison term and a parole date because, when his MEPD lapsed, his parole was evaluated to no longer pose an unreasonable risk of danger to society or public safety. (Penal Code (PC) §3041(a); 15 California Code of Regulations (CCR) §§ 2280, 2281(a).)

In some cases, a lifer who otherwise qualifies for parole may be found unsuitable for and denied parole if the commitment offense was especially egregious when compared to other instances of the same offense. Such cases, however, are *exceptions*, and not per the rule. Accordingly, the conduct of an up-to-life sentenced inmate who committed second degree murder **must** be especially violent when compared to that of other second degree murderers for parole to be denied on the basis of the offense in the case of an otherwise qualified inmate. However, the offense cannot serve as a basis for denying parole interminably. In re Ramirez (2001) 94 Cal.App.4th 549, 569-570; Rosenkrantz V, 658. (cf: Biggs v. Terhune (9th Cir. 2003) 34 F.3d 910; Irons v.

¹ There have been seven (7) "Rosenkrantz" decisions: People v. Rosenkrantz (1988) 198 Cal.App.3d 1187; In re Rosenkrantz (2000) 80 Cal.App.4th 409; Davis v. Superior Court (2-22-01, B146421 [non-pub.]; In re Rosenkrantz (2002) 95 Cal.App.4th 358; In re Rosenkrantz (2002) 29 Cal.4th 616; In re Rosenkrantz L.A. County Sup.Ct. no. BH003529, filed 6-26-2006 ;Rosenkrantz v. Marshall (2006) 444 F.Supp.2d 1036.

1 Warden (E.D. Cal. 2005) 358 F.Supp.2d 936; Martin v. Marshall (N.D. Cal. 2006) 431 2281(b); In re Minnis
 2 (1972) 7 Cal.3d 639, 646; In re Rosenkrantz (2000) 80 Cal.App.4th 409, 424-427 (Rosenkrantz V); Rosenkrantz
 3 V, 655; Ramirez, supra, 566. The "some evidence" standard is satisfied if there is F.Supp.2d 1038 (Martin I);
 4 Rosenkrantz v. Marshall (C.D. Cal. 2006) 444 F.Supp.2d 1063 Rosenkrantz VI.)

5 Here, Petitioner did not intend that anyone would die as a result of the melee and any violent
 6 consequences and he was therefore sentenced as a youth originally and cannot have committed any crime in
 7 any definitive criteria which would suggest that his crime was committed in "an exceptionally cruel manner" nor
 8 with an "especially callous disregard for the suffering of another" because he did not intend the logical
 9 consequences of the actual perpetrator and had no specific intent to do any harm to anyone such as this wanton
 10 murder of an innocent.

11 Substantive due process requires that the grounds set forth by a BPH panel for its decision must be
 12 supported by at least some credible, relevant evidence in the record. The panel was required to base its findings
 13 on a weighing of all relevant, reliable evidence. (15 CCR § substantial, reliable evidence in the record that could
 14 support the conclusion reached. Powell v. Gomez (9th Cir. 1994) 33 F.3d 39, 40; Cato v. Rushen (9th Cir. 1987)
 15 824 F.2d 703, 705. And federal due process requires substantial evidence having indicia of reliability Jancsek v.
 16 Oregon Bd. Of Parole (9th Cir. 1987) 833 F.2d 1389, 1390; In re Powell (1988) 45 Cal.3d 894, 904; Rosenkrantz
 17 V, 658; McQuillen, supra, 306; Biggs, supra, 915; Caswell v. Calderon (9th Cir.2004) 363 F.3d 832, 839.

18 Black's Law Dictionary 5th Ed. 1979 defines **SUBSTANTIAL EVIDENCE** as follows:
 19 "Such evidence that a reasonable mind might accept as adequate to support a conclusion.
 20 ***It is that quality of evidence necessary for a court to affirm a decision of an Administrative***
 21 ***board.*** (Black's p. 1281, citing State v. Green (1974) 544 p.2d 356, 362. emphasis added.)

22 The Due Process clause of the Fourteenth Amendment prohibits state action that deprives a
 23 person of life, liberty, or property without due process of law. A person alleging a due process violation must first
 24 demonstrate that he or she was deprived of a liberty or property interest protected by the Due Process Clause,
 25 and then show that the procedures that led to the deprivation were constitutionally insufficient. Kentucky Dept. of
 26 Corrections v. Thompson (1989) 490 U.S. 454; McQuillen, supra, 900.

27 In the parole context, a prisoner alleging a due process claim must demonstrate the existence of a
 28 protected liberty interest in parole, and the denial of one or more of the procedural protections that must be
 afforded when a prisoner has a liberty interest in parole. The Supreme Court held in 1979, and reiterated in

1 1987, that "a state's statutory scheme, if it uses mandatory language, creates a presumption that parole release
 2 will be granted when or unless certain designated findings are made, and thereby gives rise to a constitutional
 3 liberty interest." McQuillen, supra, 901 (citing Greenholtz v. Nebraska Penal Inmates (1979) 442 U.S. 1, 7 and
 4 Board of Pardons v. Allen (1987) 482 U.S. 369, 373. Because no evidence supported the panel member's
 5 finding that Petitioner's parole poses an "unreasonable risk of danger to society" or to "public safety," and the
 6 finding was inapposite to the record, parole denial on that basis subverted due process and substantiates those
 7 who contend that this state is without an excuse as to why the denial rate is what it is.

8 The reason stated by the panel for finding Petitioner unsuitable was BPH's boilerplate statement that his
 9 parole "would pose an unreasonable risk of danger to society or a threat to public safety." (Exhibit "A", p. 63) the
 10 sole ground set forth by the panel in support of its Decision to AGAIN, for the sixth (6th) time, deny suitability and
 11 dismiss his warrant of parole which is long overdue! (His M.E.P.D. was 4-19-1997.)

12 Parole denial based on the "unreasonable risk" subterfuge abandoned principles of independence and
 13 abrogated due process because it is supported by **NO** reliable evidence. All of the competent, professionally-
 14 sanctioned evidence that addresses Petitioner's current and future dangerousness, parole risk, etc., found it to
 15 be "no greater than the average citizen," or "suitable for release," nor has it been for over a decade.
 16 "Significantly, *the evidence underlying THE DECISION must be supported by "some indicia of reliability."*"
 17 Rosenkrantz VI, supra, at p. 1083, emphasis added. (See again Exhibit "B", Exhibit "A", at p.43.)

18 Utilizing the legal precedent established as the focal criteria, all relevant, reliable evidence in Petitioner's
 19 records that addresses his dangerousness and parole "risk" all assess these factors to be low. And, because not
 20 a scintilla of reliable, relevant evidence supports the panel's flawed findings, the sole relevant reason for finding
 21 him unsuitable for parole sensibly suggests this was an illegitimate (ongoing) basis for denial. Martin v. Marshall
 22 (N.D. Cal. 2006) 431 F.Supp.2d 1039, (Martin I), Martin v. Marshall 448 F.Supp.2d 1143, (Martin II), et al.

23 In Martin II, supra, Justice Patel found NO justification for the panel's boilerplate lack of individual
 24 consideration and in her July 21, 2006 Memorandum and Order she stated:

25 "In light of the Board's apparent abandonment of its independent role"—**which occurred AFTER**
 26 **Governor Schwarzenegger took office---**, "*the court finds that a remand would indeed be futile.*" There can be
 27 no question but that the implication here is exactly what it means: NO INDEPENDENT PAROLE DECISION BY
 28 THE WILSON, DAVIS, OR SCHWARZENEGGER regimes for this Petitioner. Id. at p. 1144. (Emphasis added.)

1 In Rosenkrantz V., supra, at p. 655, the Supreme Court explained that parole release decisions "entail
2 the [BPH]'s attempt to predict by subjective analysis whether the inmate will be able to live in society without
3 committing additional antisocial acts." Such a prediction requires analysis of individualized factors on a case-by-
4 case basis and the BPH's discretion in that regard is almost unlimited. Notwithstanding that the BPH's discretion
5 is exceedingly broad, it is circumscribed by the requirements of procedural due process. (Rosenkrantz, id., Calif.
6 Const. article I, § 7(a), and statutory directives mandating a fair and unbiased Hearing.)

7 Absent substantial evidence of the presence of unsuitability factors, there must be some relevant,
8 reliable evidence that a petitioner is otherwise unsuitable for parole, such as by his having failed to meet the
9 suitability criteria under 15 CCR § 2402, subd. (d); §§ 1-4, 6-9. And, while the BPH has exceedingly broad
10 discretion in its parole decisions, the Findings must reflect "*an individualized consideration of the specified*
11 *criteria and cannot be arbitrary or capricious.*" Rosenkrantz V., supra, 677; "[t]he liberty interest is created, not
12 upon the grant of a parole date, but upon the incarceration of the inmate." Biggs, supra, 914.

13 The failure to properly consider the post-incarceration factors highlights the inherent misunderstanding
14 and application of the "some evidence" standard and triggers the required scope of judicial review of the federal
15 questions presented here.

16 There are two sets of parole criteria regulations, not one. 15 CCR §§ 2402, subd. (c) [Circumstances
17 Tending To Show Unsuitability], and 2402 subd. (d) [Circumstances Tending To Show Suitability]. It appears that
18 the BPH's focused emphasis has been on, and remains on, subdivision (c), with little or no regard given to
19 subdivision (d). Petitioner asserts, as a matter of statutory construction, the "public safety" concern in PC §
20 3041(b), demands an equal (or neutral) emphasis at the outset of a panel's deliberations AND on its Findings
21 under both sets of criteria and any balanced and reasonable interpretation should compel this approach
22 throughout the entire process due any inmate and to do so would virtually assure a Finding of suitability.

23 Factors TENDING to show suitability or unsuitability must be weighed and balanced within the
24 parameters of a standard of proof. Without this critical, reliable component, the process is inherently arbitrary,
25 capricious, and defective. This standard-less analysis would vitiate the individualized consideration held
26 appropriate in Rosenkrantz V. The crux of the matter is that of a standard of proof with indicia of reliability as set
27 forth below and reinforced with significant legal precedent.

28 The "some evidence" standard is NOT the sole standard of evidence to be applied to the BPH's

1 decisions. It is only one aspect of *judicial* review employed by a habeas court. Edwards v. Balisok (1997) 520
2 U.S. 640, 647. And, if the Rosenkrantz V decision implies, as it does, that the "some evidence" standard should
3 be applied to the BPH Findings, then this is a clear and unreasonable application of well-established federal
4 Constitutional law set forth by the High Court. Nothing in Superintendent v. Hill (1985) (Hill) 472 U.S. 445, 456,
5 implies that it IS A STANDARD OF EVIDENCE to be applied by any agency, board, or executive body outside a
6 disciplinary committee within an exigent-circumstances prison setting that has no pressing need for more formal
7 evidentiary standards or anything warranting standard-less precedents

8 What IS implied by the Rosenkrantz V court, when it held that a habeas court can't reverse a decision
9 denying parole even if it determines that the evidence overwhelmingly preponderates towards a finding of
10 suitability is completely unreasonable because it prevents effective habeas relief from an arbitrary and capricious
11 decision, and worse, stymies effective judicial review. This court is not obliged nor compelled to defer to a state
12 decision misapplying federal constitutional principles. Hubbart v. Knapp (9th Cir. 2004) 379 F.3d 773, 780;
13 referencing Mullaney v. Wilbur 421 U.S. 684, 691; see also Peltier v. Wright (9th Cir. 1994) 15 F.3d 860, 862.

14 In Oxborrow v. Eikenberry (9th Cir. 1989) 877 F.2d 1395, 1399, the Circuit held that: "Our deference to
15 the [state court] is suspended only upon a finding that the court's interpretation of [state law] is untenable or
16 amounts to a subterfuge to avoid federal review of a constitutional violation." Thus, it is petitioner's contention
17 that respondents seek to avoid federal review by asserting that the "some evidence" standard 1) is applied by the
18 BPH and/or, 2) limits judicial review ONLY to the BPH's ultimate decision and not to a finding of a defective pre-
19 Decision process.

20 If Petitioner were the beneficiary of an individualized consideration utilizing real evidence with reliable,
21 articulate proof, it would have logically flowed that he is now MORE suitable than his previous hearing wherein
22 he encouraged that if he continued his positive programming and rehabilitation he would likely be found suitable.
23 (Exhibit "B".) All those laudatory words at his Hearing would have had a consistent ring of truth to them in that he
24 has progressed towards a more-suitable mien, not the reverse. This highly illegal "boilerplate" denial now rises to
25 the level of a federal due process violation. Biggs, supra, pp. 916-917; Martin I, supra, 1042.

26 Please note that the previous Decisions denying parole also gave advice; the present denial is almost a
27 carbon copy of the last panel's decision. This summary denial of suitability leading to parole now rises to the
28 level of a federal due process violation. Biggs, supra, p. 917; Martin I, supra, 1048-49.

1 The High Court in Greenholtz (at p. 7) Allen (at p. 373) , supra, established that:

2 "While there is no constitutional or inherent right of a convicted person to be conditionally
3 released before the expiration of a valid sentence, a state's statutory scheme, if it uses
4 mandatory language, creates a presumption that parole release will be granted when or unless
certain designated findings are made, and thereby gives rise to a constitutional liberty interest."
(Citing McQuillen, supra, at 901.)

5 In the absence of any evidence in the record supporting the BPH's decision, remanding the case back to
6 be reheard is a futile act, and the appropriate remedy is release of the Petitioner. McQuillen II, supra, p. 1015-15;
7 Martin II, supra, p. 1145; Rosenkrantz VI, supra, p. 1087.

8 A petitioner is entitled to "something more than mere pro forma consideration.", e.g. meaningful
9 individual consideration. Not a sham hearing using rote words and repeating boilerplate from a pre-printed form.
10 The only mandate "normally" being followed under P.C. § 3041 (a), is a multi-year denial under § 3041 (b) to
11 "swallow" the due process required under the 14th Amendment, an ingestion violating the equal protection
12 guarantees and abridges Petitioner's civil rights under both state and federal Constitution's proscription against
13 this tactic for all similarly-situated inmates. In re Sturm (1974) 11 Cal.3d 258, 268; Ramirez, supra, at 570;
14 Rosenkrantz V, at pp. 658, 683.

15 "Judicial oversight must be extensive enough to protect the limited right of parole applicants "to
16 be free from an arbitrary parole decision ... and to something more than mere pro forma
17 consideration." [citation omitted] The courts may properly determine whether the [BPH]'s
18 handling of parole applications is consistent with the parole policies established by the
19 Legislature. [] while courts must give great weight to the [BPH]'s interpretation of the parole
20 statutes and regulations, final responsibility for interpreting the law rests with the courts. []
21 Courts must not second-guess the [BPH]'s evidentiary findings [] However, it is the proper
22 function of judicial review to ensure that the [BPH] has honored in a "practical sense" the
23 applicant's right to "due consideration." [] Ramirez supra, at 564.

24 (Since it is clear that parole should be the rule and not the exception, a moderate or average risk cannot
25 be construed as "unreasonable." Were an average risk grounds for parole denial, then the exception would
26 "operate so as to swallow the rule that parole is 'normally' to be granted. Rosenkrantz V, at pp. 658, 683.)

27 "All violent crime demonstrates the perpetrator's potential for posing a grave risk to public safety
28 ... {However} the [BPH] "shall normally set a release date." [citation omitted] The [BPH]'s
authority to make an exception ... should not operate to swallow the rule that parole is 'normally'
to be granted. ...Therefore, a life term offense must be *particularly egregious* to justify the denial
of a parole date. In order to comply with the parole policy established by the Legislature in P.C.
§ 3041, the [BPH] must weigh the inmate's criminal conduct not against ordinary social norms,
but against other instances of the same crime or crimes." (Ramirez, supra, at 570, disapproved
on other grounds, emphasis added as usual in published cases.)

The applicability of this standard to the review of decisions applies and Petitioner's right to due

1 consideration does not appear to have been honored in any practical sense by the panel in this case and their
2 Decision is facially and legally deficient. In the instant case the BPH made no effort to comply with the controlling
3 rules and seems to have merely stated its "predetermined conclusion." (See: In re Caswell (2001) 94 Cal.App.4th
4 1017, 1030.)

5 In In re Smith (2003) (Smith II) 114 Cal.App.4th 343, 369, the Sixth District Court of Appeals found that
6 there was not some evidence that Smith's crime was more callous than the average second degree murder.
7 There was nothing to "distinguish th[e] crime from other second degree murders ... the record provides no
8 reasonable grounds to reject, or even challenge, the findings and conclusions of the psychologist and
9 counselor[s] concerning [his] dangerousness."

10 The Second District Court of Appeals, in the case of another life-term inmate named Smith similarly
11 found no evidence to support a parole denial based on the commitment offense. In re Smith (2003) (Smith I) 109
12 Cal.App.4th 489.

13 Compare In re Scott (2004) 119 Cal.App.4th 871, 876-877 [Scott I], where the First District reversed the
14 BPH's standard statement of reliance on the gravity of the crime because in truth, "the relevant evidence
15 show[ed] no more callous disregard for human suffering than is shown by most second degree murder offenses."
16 (Governor's rescission of Scott's parole unanimously reversed on 10-18-05, see: In re Scott 133 Cal.App.4th 538,
17 Scott II.)

18 On 5-18-05, in Coleman v. BPT (E.D. Cal. No. 97-0783), Honorable Judge L. Karlton adopted the
19 Findings and Recommendations IN FULL. There, it was found that ex-governors Davis and Wilson (and NOW
20 Governor Schwarzenegger, too. See *infra* at p. 3), had/have panels with a sub rosa "no parole" policy and
21 were/are carrying it out. Martin I, *supra*, pp. 1048-49; Martin II, *supra*, p. 1144; (see Coleman and Final Order,
22 attached as Exhibit "F", Petition for Rehearing and Rehearing en banc filed by BOTH parties.)

23 It is beyond debate that neither a state agency interpreting an enabling statute nor any court of the state
24 can construe a statute contrary to Legislative intent or the ordinary meaning of the words used in a statute. Our
25 Court, in the entire history of the statute, has never construed it with any adequacy according to the plain
26 meaning to create guidance and instill compliance by both the BPH panels and those who serve the governors
27 otherwise, although it would seem enough time and toil has passed to have done so.

28 Instead, this lack of judicial construction has led to the many years of overwhelming denials that DO

1 NOT reflect in any clear way the presumptions of § 3041. Nor does it reflect instruction as to what the agency's
2 burden of proof is or the legal significance of relevant, reliable, or material evidence. This lack of judicial
3 guidance has left unfettered discretion in the hands of lay appointees to determine the legal import of evidence
4 (or lack thereof) although these persons are arguably unqualified by a dearth of professional standing to make
5 these determinations upon which a federal liberty interest depends.

6 Determining the legality and weight and of evidence requires some specific legal training in evidentiary
7 law; not by lay persons, and which lack of training is visibly evident in the incongruously inapposite findings thus
8 made. (McQuillen I, supra, 907-912; Rosenkrantz V, supra, 680; Rosenkrantz II, supra, 424-426; Smith II, supra,
9 361; Smith I, supra, 501-506.) These are only a few of the published cases but unpublished absurdities
10 exponentially abound!

11 The Sixth district held for the proposition in Smith II at 361 that "[t]he weight given the specified factors
12 relevant to parole suitability lies within the discretion of the BPH."; a court's determination "of whether the
13 *preponderance of the evidence* supports a finding of suitability is irrelevant." (Emphasis added.) This is the first
14 time a published decision on the BPH has even mentioned a burden of proof. This reference infers the BPH must
15 honor this evidentiary standard as faithfully to the letter as legally possible.

16 Yet there is no settled bright line rule for a court to determine if the BPH has met that standard. Just the
17 opposite, in fact, since Smith II strongly suggests that even if a reviewing court finds the agency did not meet the
18 standard, an allegation of "some evidence" is sufficient to automatically require judicial deference.

19 The Third District Court of Appeals stated the following as fact:

20 "It is without doubt that a blanket no-parole policy would be contrary to the law, which
21 contemplates that persons convicted of murder without special circumstances may eventually
22 become suitable for parole and that, when eligible, they should be considered on an
23 individualized basis. Thus, blanket policies have long been deemed to be improper. ¶ In Roberts
24 v. Duffy (1914) 167 Cal. 629, a decision that predates the enactment of our state's old
indeterminate sentencing law, the Court condemned a blanket parole policy that was contrary to
the statutory parole scheme then in place. It appeared that the statutory law *allowed a prisoner to*
apply for parole after serving ONE YEAR but that, **contrary to the statute, the parole authority**
adopted a rule precluding application until one-half the sentence was served.

25 The Court held that, "while the prisoner had no right to apply to release on parole at any
26 time, **he was entitled to apply** and have his application duly considered on an individualized
basis." *Id.* at pp. 640-641.

27 (Does this sound familiar? Emphasis added to original citation.)

28 "With respect to persons sentenced to indeterminate terms, the purpose of punishment is

satisfied by the requirement of service of a minimum period before eligibility for parole and, when suitable for parole, by determination of a release date **in a manner that will provide** UNIFORM TERMS for offenses of similar gravity and magnitude with respect to their threat to the public." (P.C. §§ 3041, 3041(a), 3041.5, citing In re Morrell (2002) 102 Cal.App.4th 280, 291-292.)

The arbitrary or capricious misapplication of statutory law violates both state and federal due process. Hill, supra, at p. 428; Gordon v. Duran (9th Cir. 1990) 895 F.2d 610, 613; In re Edsel P. (1985) 165 Cal.App.3d 763, 779. "The touchstone of due process is protection of the individual against [the] arbitrary action of government." Wolff v. McDonnell (1974) 418 U.S. 539, 558.)

These principles apply in equal force to incarcerated prisoners. (In re Jones (1962) 57 Cal.2d 860, 862; ["a convicted felon, although civilly dead, is nevertheless a 'person' entitled to protection of the 14th Amendment."]; In re Price (1979) 24 Cal.3d 448, 453 [acknowledging that P.C. § 2600 limits a prisoner's deprivation to only such rights "as is necessary in order to provide for the reasonable security of the institution in which he is confined."].)

In interpreting a prisoner's rights of substantive due process the High Court has held that a prisoner may derive a due process liberty interest from administrative regulations, as well as state law and the U.S. Constitution. Sandin v. Conner (1995) 515 U.S. 472, 484; Hewitt v. Helms 459 U.S. 460, 469, receded from on p. 484, fn. 5; Meachum v. Fano (1976) 427 U.S. 215, 226; Wolff, supra, at p. 557. In applying these standards here, the BPH violated Petitioner's right to constitutional due process but he is not challenging the BPH's right to conduct professional psychological assessments as the main focus of the parole evaluation process, but does challenge their "normal" practice of summarily dismissing and patently ignoring their own experts.

Predictions of future conduct necessarily relate to public safety concerns but Judge Karlton in Irons v. Warden (E.D. Cal. 2004) 358 F.Supp.2d 936, discussed this conundrum and noted that the propensity analysis:

"To a point, it is true, the circumstances of the crime and motivation for it may indicate a petitioner's instability, cruelty, impulsiveness, violent tendencies and the like. However, after 15 or so years in the cauldron of prison life, not exactly an ideal therapeutic environment to say the least, and after repeated demonstrations that despite recognized hardships of prison, [petitioner] does not possess these attributes, the predictive ability of the circumstances of the crime is near zero."²

² "It is worth noting, as has our [Calif.] Supreme Court (People v. Murtishaw (1981) 29 Cal.3d 733, 768, disapproved on other grounds in People v. Boyd (1985) 38 Cal.3d 762., that a large number of legal and scientific authorities believe that, even where the passage of time is not a factor and the assessment is made by an expert, predictions of future dangerousness are exceedingly unreliable. (See, e.g., Monahan, *Violence Risk Assessment: Scientific Validity and Evidentiary Admissibility*, 57 Wash. & Lee L. Rev. 901 (2000); Otto, *On the Ability of Mental Health Professionals to 'Predict Dangerousness'*, 18 Law & Psychol. Rev. 43 (1994); Lidz, et al., *The Accuracy of Predictions of Violence to Others*, 269, Jour.Am.Med.Assn. 1007 (1993); Diamond, *The Psychiatric Prediction of Dangerousness*, 123 Pa.L.Rev. 439 (1974); Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions* (1970) 23 J. Legal Ed. 24. According to a Task Force of the American Psychiatric Assn., "[n]either psychiatrists nor anyone else have demonstrated an ability to predict future violence or dangerousness. (Am.Psych.Assn., Task Force Rpt. 8, *Clinical Aspect of the Violent Individual* (1974) at p. 28.) As our [Calif.] Supreme Court has also noted,

(Irons, supra, at p. 947, fn. 2, this 'dicta' was also cited as Headnote #10 at p. 937; see additional discussion of "need for more therapy" used as a ruse to deny suitability at p. 948.)

P.C. § 3041(a) governs parole suitability determination processes and does not define more than one class of persons. The statute generalizes that its focus is "any prisoner" who is serving an indeterminate term. Through application, however, the agency's discrimination amongst the class serving indeterminate sentences is in violation of the right to equal protection ensconced in the Fourteenth Amendment. Equal protection is "[in essence] a direction that [a person] similarly situated should be treated alike." (City of Cleburne v. Cleburne Living Ctr. (1985) 473 U.S. 432, 439, citing Plyler v. Doe (1982) 457 U.S. 202, 216, "To state a claim ... for violation of the Equal Protection Clause of the 14th Amendment a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class." Barren v. Harrington (9th Cir. 1998) 152 F.3d 1193, 1194, cert. denied 525 U.S. 1154 (1999).)

Strict scrutiny, alternatively, is utilized if the government distributes benefits or burdens in a manner inconsistent with fundamental rights. (See Sosna v. Iowa (1975) 419 U.S. 393; Shapiro v. Thompson (1969) 394 U.S. 618.) The fundamental right here is the due process right to relevant, reliable evidence being considered when analyzing a right to release on parole. McQuillen I, supra, at 900; McQuillen II, supra, at 1012; Martin I, supra, at 1043: ("[T]he deferential 'some evidence' standard has outer limits. [citing Coleman, supra, with approval slip op. at 9] If it is established that a particular judgment was predetermined, then a prisoner's due process rights will have been violated even if there is 'some evidence' to support the decision. [See Bakalis v. Golembeski (7th Cir. 1994) 35 F.3d 318, 326] (a decision-making "body that has prejudged the outcome cannot render a decision that comports with due process. ... The California Supreme Court has explicitly stated that a blanket no-parole policy as to a certain category of prisoners is illegal. [In re Minnis; In re Morra]) " ... Because petitioner cannot change the past, denying [P]etitioner parole based only on the facts surrounding the crime itself effectively changes his sentence ... into life imprisonment without the possibility of parole." Ibid. at 1046.) (cf: Martin II, supra, at 1144: "In sum, the Board appears to have capitulated to the blanket no-parole policy

"the same studies which proved the inaccuracy of psychiatric predictions [of dangerousness] have demonstrated BEYOND DISPUTE the no less disturbing manner in which such prophecies consistently err: they predict acts of violence which will not take place ('false positives', thus branding as 'dangerous' many persons who are in reality totally harmless. [citation.]" (People v. Burnick (1975) 14 Cal.3d 306, 327.) (all emphasis in original). (See: copy of Order denying Review, dated 11/30/05, Daily Journal 12/2/05, p. 13803, attached as Exhibit "B"). Scott II, supra, footnote #9.

1 described by this court in its previous [Martin I] Order, abandoning its role as an independent assessor of
2 petitioner's eligibility. This capitulation is particularly troubling in light of the Board' vigorous assertions of
3 independence during the 2003 hearing." This Honorable Court should grant the writ and Order all appropriate
4 relief including a complete discharge from custody and sanction full redress for Petitioner.

5 CONCLUSION

6 WHEREFORE, Petitioner respectfully submits that the writ should be granted in full and all available
7 remedies leading to his immediate release from custody be Ordered at the earliest possible moment and
8 forthwith. It is respectfully requested that an evidentiary hearing be Ordered as an alternative to the above
9 should there be consideration of the "no parole" policy and/or practice by this or previous administrations.

10 ///

11 ///

12 ///

7. Ground 2 or Ground _____ (if applicable):

PETITIONER'S FEDERAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTIONS WERE VIOLATED WHEN RESPONDENTS UTILIZED A LESSER STANDARD OF LEGAL PROOF REQUIRING EVIDENCE WITH SOME INDICIA OF RELIABILITY TO FIND THAT PETITIONER IS UNSUITABLE TO PAROLE AND IS THEREFORE AN UNREASONABLE RISK

a. Supporting facts:

Nowhere is there any codification that avers petitioners must prove his or her suitability. Only if an inmate is found unsuitable does evidence become citable. (See Dannenberg, at 1095; Rosenkrantz at 658, 683.) Evidence must be specific, articulable, and have "some indicia of reliability." Respondents have the burden of proof to demonstrate, in the Record, why an inmate is not suitable and a denial of more than one year requires that the BPH panel state for the Record why it isn't likely that petitioners would be found suitable any time sooner. There is a wholesale vitiation going on here.

Procedural safeguards require: a hearing one year prior to the MEPD, CCR §§2268(b)[2400 et seq.], 2270(d), (e), (f); PC §3041 (a), CDC v. Morales (1995) 115 S.Ct. 1597, 1600; service and prior examination of all material considered; representation if desired.

The one-year lead on a MEPD imparts that the Legislature intended that some inmates will be suitable at an initial hearing otherwise why would such a gratuitous mandate exist? Governor's-level review presumes a neutral, well-defined, professional body that will follow all the state and federal laws. Only this practice

(continued on attached pages)

b. Supporting cases, rules, or other authority:

(SEE ATTACHED POINTS AND AUTHORITIES)

1 Ground 2, continued:

2 would meet the constitutional burden under the discretionary methods
3 needed to quickly resolve an uncertain matter.

4 The "some evidence" relied on to deny parole must be relevant
5 and reliable in establishing Petitioner is a current, unreasonable
6 threat to public safety and must not be grounded in an incomplete
7 or unreasonable assessment of the relevant factors.

8 In explaining what the "some evidence" standard meant, the
9 Court in In re Rosenkrantz (2002) 29 Cal.4th 616 at 677, stated
10 that "[o]nly a modicum of evidence is required." On its face, this
11 standard could thus be seen as remarkably broad--that a scintilla
12 of evidence (or the BPH's assessment of it)--would be enough to
13 completely immunize BPH decisions from judicial review. However,
14 such a reading would effectively serve to nullify the Rosenkrantz
15 court's holding rejecting the Executive's position that factual
16 decisions rejecting parole were immune from examination by the courts
17 and in point of fact were required.

18 A dissection of the "some evidence" standard itself--both
19 conceptually and through a review of the application of the
20 Rosenkrantz' standard (and its progeny)--makes clear that this is
21 the meaningful standard. Properly understood, it strikes an
22 appropriate balance between judicial deference to difficult BPH
23 decisions and the protection of constitutional liberty interests.

24 The "some evidence" standard of review is laid out here:

25 "[W]e conclude that the judicial branch is authorized
26 to review the factual basis of a decision of the [BPH]
27 denying parole in order to ensure that the decision comports
28 with the requirements of due process of law, but that
in conducting such a review, the court may inquire only
whether some evidence in the record before the [BPH] sup-
ports the decision to deny parole, based upon the factors

1 specified by statute and regulation. Rosenkrantz, 658.
2 "[a]s long as the [BPH] decision reflects due consideration
3 of the specified factors as applied to the INDIVIDUAL
4 PRISONER in accordance with applicable legal standards,
the court's review is limited to ascertaining whether
there is some evidence in the record that supports the
[BPH] decision." Id. at 677. (emphasis added).

5 Thus, the inquiry into whether there is "some evidence" is
6 more complex than it might otherwise seem, as the standard MUST
7 be applied within the context of the statutory framework in which
8 it arises. This framework imposes at least 3 requirements on the
9 "some evidence" standard if it is used to deny parole.

10 First, the BPH must base their decisions only on evidence that
11 serves to establish that the inmate will or will not pose a
12 continuing, "unreasonable risk of danger to society if released from
13 prison." CCR, title 15, §2402(a), and PC §3041(b).

14 Second, the evidentiary basis for parole decisions must be
15 based on the factors specified in the regulations after
16 individualized considerations of all of the factors. Rosenkrantz
17 at 677 ("The precise manner in which the specified factors relevant
18 to parole suitability are considered and balanced lies within the
19 discretion of the [executive branch], but the decision must reflect
20 an individualized consideration of the specified criteria and CANNOT
21 BE ARBITRARY AND CAPRICIOUS."); see also In re Stanley (1976) 54
22 Cal.App.3d 1030, 1038 n.7 ("Other courts place more weight on the
23 prisoner's record of crime. We abstain from any argument over the
24 relative primacy of various parole factors. It is enough to say
25 that the Adult Authority must apply all the factors.") (citing In
26 re Minnis (1972) 7 Cal.3d 639). These factors naturally all relate
27 to whether the inmate poses a continuing, unreasonable risk of danger
28 to society if released from prison. (emphasis added).

1 Third, the evidence upon which the BPH relies must be relevant
2 and reliable. CCR §2402(b) ("All relevant, reliable information
3 available to the panel shall be considered in determining suitability
4 for parole.") (cf. CCR §§2402(d)(1-9).

5 In sum, a court examining parole decisions must determine
6 whether, after all consideration of all the factors enumerated in
7 the statute and regulations, the decision was based on: 1) some
8 evidence; 2) a reasonable consideration of all the factors specified
9 by the statutory guidelines; 3) evidence that is both relevant and
10 reliable; and 4) factual determinations that suggest an inmate poses
11 a CURRENT, UNREASONABLE THREAT TO PUBLIC SAFETY.

12 A review of the post-Rosenkrantz legal panorama reveals that
13 California courts of appeals and federal courts have routinely
14 applied the above boundaries and checkpoints of relevance,
15 reliability and reasonableness to the "some evidence" standard.
16 The California Supreme Court has so far utterly failed to establish
17 a brightline Plimsoll mark to define the full depth of the inquiry.

18 The courts continue to assess the reasonableness of the BPH's
19 interpretation of the facts and circumstances used to legally sus-
20 tain a finding of parole suitability denial. The court in In re
21 Van Houten (2004) 116 Cal.App.4th 339, 356, assessed whether the
22 BPH was reasonably able to conclude that there was some evidence
23 of the inmate's need of continuing therapy and her dangerousness
24 to the public. Though it found in the affirmative, the court took
25 a close look at whether the BPH "could reasonably conclude that
26 [her] defense, that Manson's influence overwhelmed [her], was
27 exaggerated such that she is fully responsible for the LaBianca
28 murders" and whether "[t]he BPH could infer with sufficient

1 reasonably to satisfy a minimal 'some evidence' standard that
2 [she] is a danger to the public and in need of continued therapy
3 and programming." Her denial was affirmed with instructions.

4 Judicial inquiry into the stated reasons for parole denial
5 have their place and numerous state and federal courts--in a wide
6 range of contexts--have similarly held the judicial inquiry into
7 the reasonableness of BPH determinations and conclusions is
8 appropriate, even when such determinations and conclusions are
9 accorded broad deference. (See, e.g., In re Farley (2003) 109
10 Cal.App.4th 1356, 1361-2: "Judicial review of a CDC custody
11 determination is limited to determining whether the classification
12 decision is arbitrary, capricious, irrational, or an abuse of the
13 discretion granted those given the responsibility for operating
14 prisons. While we must uphold respondent's classification action
15 if it is supported by "some evidence" and we must afford great
16 deference to an administrative agency's expertise, where the agency's
17 interpretation of the regulation is clearly arbitrary or capricious
18 or has no basis, COURTS SHOULD NOT HESITATE TO REJECT IT."

19 Federal courts likewise require parole decisions to be
20 reasonable. As an example, in a parole rescission case, a federal
21 court in this state held: "the Court of Appeals conclusory findings
22 that there was 'some evidence' to support the rescinding, the BPH's
23 decision that parole was improvidently granted to petitioner are
24 contrary to clearly established federal law and, to the extent they
25 are fact-based, represent unreasonable determinations of the facts
26 in light of the evidence presented in the state court proceedings."
27 Stockton v. Hepburn (N.D. Cal. 2005) 2005 U.S. Dist. LEXIS 4877 at
28 43; see also Irons v. Warden (N.D. Cal 2004) 358 F.Supp.2d 936,

1 948 ("Clearly, a conclusion by lay BP[H] commissioners that
 2 petitioner has not yet achieved required therapy for insight OR
 3 OTHER REASONS is not reasonably sustainable, and a state court's
 4 conclusion to the contrary is patently unreasonable.")

5 The federal liberty interest is made an adjunct to the state
 6 requirements of due process by and through the 14th Amendment to
 7 the U.S. Constitution and the substantial evidence of the federal
 8 standard must be overcome to meet federal guarantees to its citizens
 9 who, before they became entitled to state civil rights, were first
 10 bestowed by operation of their federal citizenship. A state cannot
 11 lawfully deny any federal right to its citizens but that is exactly
 12 what respondents are demanding of their agents in the BPH, and will
 13 no doubt now ask this Honorable Court to sign off on. That must not
 14 be allowed if the judiciary is to be truly separated from the
 15 Executive charades disguised as a legitimate exercise in freedom.

16 The goal of indeterminate sentences and the parole system is
 17 not only to punish, but also to provide for reformation and
 18 rehabilitation as the CDC's renaming suggests:

19 "The belief no longer prevails that every offense in
 20 a like legal category calls for an identical punish-
 21 ment without regard to past life and habits of a parti-
 22 cular offender. ... Retribution is no longer the domi-
 23 nant objective of the criminal law. Reformation and
 24 rehabilitation of offenders have become important goals
 25 of criminal jurisprudence."

23 People v. Morse (1964) 60 Cal.2d 631, 643 n.8 (quoting Williams
 24 v. State of New York (1949) 337 U.S. 241, 247). In a lengthy discus-
 25 sion of this topic, the Supreme Court stated the following:

26 "[T]he purpose of the indeterminate sentence law, like
 27 other modern laws in relation to the administration
 28 of criminal law, is to mitigate the punishment which
 would otherwise be imposed upon the offender. These
 laws place emphasis upon the reformation of the offender.

1 They seek to make the punishment fit the criminal rather
2 than the crime. They endeavor to put before the prisoner
3 great incentive to well-doing in order that his will
4 to do well should be strengthened and confirmed by the
5 habit of well-doing. [...] [The] interests of society
6 require that under prison discipline every effort should
7 be made to produce a reformation of the prisoner. ...
8 The legislative policy [was to provide a system whereby]
9 a hope was to be held out to prisoners that through
10 good conduct in prison and a disposition shown toward
11 reformation, they might be permitted a conditional liberty
12 upon restraint under which they might be restored
13 again to society. ... Although good conduct while in-
14 carceratd and potential for reform are not the only
15 relevant factors, this court has acknowledged their
16 significance. Furthermore, the Authority has declared
17 that these factors are among those of 'paramount impor-
18 tance. In re Minnis, 7 Cal.3d 644-45.

11 The Rosenkrantz Court, at 656, citing to Minnis, reaffirmed
12 these principles: "[E]ven before factors relevant to parole de-
13 cisions had been set forth expressly by statute and regulations,
14 we concluded that '[a]ny official or board vested with discretion
15 is under an obligation to consider all relevant factors [], and
16 the [BPH] can't, consistently with its obligation, ignore post-
17 conviction factors UNLESS DIRECTED TO by the Legislature." (citing
18 Minnis at 645; emphasis added for illumination).

19 Petitioner has a Constitutional liberty interest in parole
20 decisions and "[P]arole applicants in this state have an expectation
21 that they will be granted parole unless the BPH finds, in its
22 reviewable discretion, that they are unsuitable for parole in light
23 of the circumstances specified by statute and regulation."
24 Rosenkrantz at 654 and at 659-61 this liberty interest is an
25 expectation protected by due process of law. (holding that the
26 California Constitution Art. V, §8(b) and PC §3041 "give rise to
27 a protected liberety interest" in that "a prisoner granted parole
28 by the BPH has an expectation that the Governor's decision to affirm

1 modify, or reverse the BPH's decision will be based upon the same
2 factors the BPH is required to consider," and that "this liberty
3 interest underlying a Governor's parole review decision is protected
4 by due process of law.").

5 Federal courts have also unequivocally held that California's
6 parole system gives rise to a liberty interest constitutionally
7 protected by due process. See: Allen, infra at 376-78; Greenholtz
8 v. Inmate of Neb. Penal & Corr. Complex (1979) 442 U.S. 1, 11-12
9 (holding a state's statutory parole scheme that uses mandatory
10 language may create a presumption that parole release will be
11 granted upon certain circumstances or findings, thus giving rise
12 to a constitutionally protected liberty interest); McQuillen, supra
13 at 902-3 n.1 (holding that because parole scheme uses mandatory
14 language and is largely parallel to the schemes found in Allen
15 and Greenholtz do give rise to a protected liberty interest in RELEASE
16 ON PAROLE, "California's parole scheme gives rise to a cognizable
17 liberty interest in release on parole.") Biggs v. Terhune (9th
18 Cir. 2003) 334 F.3d 910, 914-15 (same) and, ("[t]he liberty interest
19 is created, not upon the grant of a parole date, but upon the
20 incarceration of the inmate."

21 Rosenkrantz specifically rejected any position that a court
22 may not properly examine the factual basis of parole decisions
23 at 667, "[W]e conclude that the courts properly can review a
24 Governor's decisions whether to affirm, modify, or reverse a parole
25 decision by the BPH to determine whether they comply with due
26 process of law, and that such review properly can include a determi-
27 nation of whether the factual basis of such a decision is supported
28 by some evidence in the record that was before the BPH.

1 Post-Rosenkrantz, courts have reaffirmed the concepts of broad
2 executive deference but vigilant judicial review, by engaging care-
3 ful analysis, will ensure that the boundaries of due process are
4 respected and upheld. "[t]he exceedingly deferential nature of
5 the "some evidence" standard of judicial review set forth in
6 Rosenkrantz does not convert a court reviewing the denial of parole
7 into a potted plant." In re Scott (119 Cal.App.4th 871, 898, re-
8 cently affirmed).

9 The Court, in In re Dannenberg (2005) 34 Cal.4th 1061 at 1095
10 n.16 reaffirmed that effective judicial review is critical to due
11 process. Rejecting the dissent's suggestion that the opinion "per-
12 mits untethered pro forma parole denials that are insulated from
13 effective judicial review, thus contravening California life in-
14 mates' due process rights to individualized parole consideration,"
15 the majority made clear that the [BPH] must apply detailed standards
16 in evaluating individual inmates' suitability for parole on public
17 safety grounds, and that the Executive's broad discretion is subject
18 to meaningful judicial oversight.

19 There is no question that the discretion afforded to the BPH
20 with respect to parole decisions is great. However, the parole
21 system's very purpose is to provide for the reentry into society
22 of inmates who no longer pose a danger or unreasonable threat to
23 public safety, and those rights afforded thereunder are
24 constitutionally protected.

25 The BPH must abide by due process considerations, and the
26 courts are entrusted with ensuring that such considerations are
27 adequately respected and thus protected. Neither Rosenkrantz or
28 Dannenberg permits respondents to immunize themselves from re-

1 view by unreaonable and possibly unlawful assertion that certain
2 facts support a denial of parole. On the contrary, Rosenkrantz
3 and Dannenberg make clear that the courts have a vital and therefore
4 important role to play in ensuring that parole decisions are
5 actually supported by "some evidence" having a basis in fact, and
6 an indicia of reliability supported in the record.

7 Petitioner submits that there is a real danger that, improperly
8 understood, the guidelines articulated in Rosenkrantz, Dannenberg,
9 and the court of appeals will serve to provide respondents with
10 de facto immunity from judicial review, a result anathema to state
11 and federal due process protections. Properly understood, the "some
12 evidence" standard provides a fair and proper framework for review
13 of parole decisions in any venue, one that provides respondents
14 with an appropriate level of deference in making extremely difficult
15 decisions relating to inmates' liberty interests and public safety
16 concerns, while ensuring that statutory and constitutional liberty
17 interests are being adequately and lawfully safeguarded through
18 judicial review. And, when this standard is properly applied to
19 this case, there should be no doubt but that the BPH's denial of
20 suitability seems unsustainable and must be reversed, a new hearing
21 granted, and an Order with instructions issued.

22 WHEREFORE, Petitioner prays that the writ be granted in full
23 and all available relief be accorded to Petitioner to comply with
24 and comport to the state and federal Constitutions and the legal
25 adversarial process and resolution of a judicious nature in this
26 most important matter herein. Petitioner hereby incorporates by
27 reference, as though fully set forth, all papers, pleadings,
28 transcripts, exhibits and matters of record in the instant matter.

7. Ground 2 or Ground 3 (if applicable)

PETITIONER HAS A FEDERALLY-COGNIZABLE LIBERTY INTEREST IN RELEASE TO PAROLE CREATED BY RESPONDENT'S STATUTORY SCHEME AND MANDATORY LANGUAGE OF THE ENABLING STATUTES THAT REQUIRES A SUITABILITY FINDING UNDER STATUTORY CRITERIA AND RESPONDENTS' BURDEN IS NOT MET HEREIN

a. Supporting facts:

This petition is intended to give legitimate meaning to petitioner's fifteen (15) years-to-Life sentence by seeking an Order in this Court granting the writ to discharge petitioner from state prison, or alternatively, compelling the BPH to conduct a new parole consideration hearing and correctly weight their statutory findings to view suitability and consequent release to parole for Petitioner.

The issues raised are of constitutional dimension, comporting to petitioner's federal constitutional rights, and questioning the legality of petitioner's continued confinement in the face of overwhelming evidence of legally-sustainable proof of suitability and unquestioned state-hired professionals and their proffered opinions of reasonable assurance in adhering to concerns of public safety.

There is NO evidence having indicia of reliability that this petitioner poses an unreasonable risk of danger to the public and P.C. §3041(a) and California Code of Regulations (CCR), Title 15, Division II §§2402(d)(1,2,3,4,6,7,8 & 9) (parole suitability criteria) all make it clear that there IS A MANDATE, based on a legally-sufficient standard, and that standard is subject to judicial review

b. Supporting cases, rules, or other authority:

(SEE ATTACHED POINTS AND AUTHORITIES)

III

1 (continued from previous page):

2 for abuse of discretion under a federal due process and equal protection umbrella with safeguards required in a
3 review of the "evidence" of unsuitability that is burdened upon respondents.

4 The California Supreme Court recognizes that prisoners have procedural due process protections in
5 connection with parole determinations. A legitimate expectancy of release to parole is created by PC § 3041. If
6 the statute creates the legitimate expectancy of parole, it is not legally sufficient to answer that the BPH may, in
7 its broad discretion, deny parole suitability.

8 This argument, that the BPH's broad discretion swallowed Petitioners liberty interest and expectation of
9 release was squarely rejected by the High court in Allen, supra. Additionally, the Court stated in Rosenkrantz IV:
10 "[P]arole applicants in this state *Have an expectation that they will be granted parole* unless the BP[H] finds in its
11 discretion, that they are unsuitable for parole **in light of the circumstances specified by statute and**
12 **regulation.**" Rosenkrantz IV, supra, 29 Cal.4th at p. 654. And, [O]ur past decisions make clear that the
13 **requirement** of procedural due process embodied in [Art. I, § 7, subd. (a)], places some limitations upon the
14 broad discretionary authority of the BP[H]." Id. at p. 655.

15 Therefore, it is inherently clear that the presence of discretion held by the BPH does not, under either
16 state or federal law, diminish nor extinguish the expectancy of release to parole and in no ways Petitioner's due
17 process rights. It thus follows that a liberty interest has existed under PC § 3041 that is embodied in, and
18 protected by, the Fourteenth Amendment's Due Process Clause.

19 Also, CCR regulations use the "shall/unless" language (§§ 2401-2402) and recognize all available rights
20 to Petitioners. Further, these regulations AS ORIGINALLY WRITTEN, made it even clearer that parole was to
21 normally to be granted. This remained so until political operatives, presumably with a criminal bent, manipulated
22 the executive and legislative branches to repeal this proviso and substitute a "Willie Horton" revision that was
23 never fully explained to the public nor openly voted upon for acceptance and would've probably failed it there
24 had been an honest attempt to do so.

25 For respondents to abrogate this federal liberty interest they must provide substantial relevant, reliable
26 evidence having some indicia of credibility that Petitioner poses a CURRENT **unreasonable** threat to the public
27 safety, as noted in In re Lee (10-10-06) Second District Court of Appeals, Division Eight; 49 Cal.Rptr.3rd 931,
28 where the court cautioned:

1 "The commitment offense can negate suitability [for parole] only if circumstances of the crime ...
 2 rationally indicate that the offender will present an unreasonable public safety risk if released from
 3 prison. In re Scott (2005) 133 Cal.App.4th 573, 595, (however, In re Lowe (2005) 130 Cal.App.4th
 4 1405 suggested "some evidence" applies to the factors, not dangerousness.) Some evidence of
 5 the existence of a particular factor does not necessarily equate to some evidence the [inmate's]
 6 release unreasonably endangers public safety." Lee, supra, pp. 936-37.

7 ¶The board and governor must focus their parole decisions on whether a prisoner
 8 continues to pose an unreasonable risk to public safety. Such a practical inquiry, rooted in real
 9 world crime and law and order, has no obvious intersection with incorporeal realm of legal
 10 constructs." Id. at p. 940.

11 This is something they have patently failed to do, as testified by virtually all of their own witnesses as
 12 noted in attached Exhibit "B", which has been previously generated BY RESPONDENTS and provided to all
 13 concerned parties prior to Petitioner's various hearings and with NO OBJECTIONS from respondents as being
 14 accurate and meaningful to ascertain PRESENT DANGEROUSNESS.

15 "Unreasonable risk" evidence that meets the federal level of reliability must be drawn from an
 16 individualized analysis of fifteen (15) factors identified by regulations: CCR § 2402(b); Rosenkrantz IV at pp. 653-
 17 54. "Such information shall include circumstances of the prisoner's social history; past and present mental state;
 18 past criminal history; [] the base and other commitment offenses; past and present attitude toward (sic) the
 19 crime; any conditions of treatment or control ...; and any other information that bears on the prisoner's suitability
 20 for release." (Emphasis added.)

21 This extensive list of factors, including other relevant reliable information that must be considered, makes
 22 it clear that the Legislature did not intend for any single factor to initially or consistently trump all the others. This
 23 is exactly what is happening here however. Decision upon decisions by the BPH suggests that their focus is
 24 exclusively on the commitment offense, a sub-factor among the total. The BPH insistently attempts to insulate
 25 their failure to individually consider circumstances of suitability using makeweight exceptions to state by rote that,
 26 'although post-conviction behavior was DULY CONSIDERED, and the inmate is otherwise suitable for release to
 27 parole, the offense was so heinous, atrocious, or cruel, that Petitioner is ineligible for a finding of suitability. "The
 28 evidence under-lying the BPH's decision must have some indicia of reliability." Jancsek v. Oregon Board of
Parole (9th Cir. 1987) 833 F.2d 1389, 1390.

The reduction of the parole assessment process to an occluded, myopic pseudo-consideration of the
 one factor, and it alone—unerringly as an unwritten but accepted general rule practiced in all circumstances—
 was never intended by the Legislature and cannot be permitted nor allowed to continue and still comport with

1 Rosenkrantz, Biggs, Martin, Morrall, Irons, Coleman, et cetera. See also: Environmental Defense Center, Inc. v.
2 E.P.A. (2003) 344 F.3d 832, 858, fn. 36, (holding that a federal agency has acted in an arbitrary and capricious
3 fashion, if "the agency has relied on factors that Congress has not intended to consider, entirely failed to
4 consider an important aspect of the problem, and offered no explanation for its decision that runs counter to the
5 evidence before the agency, or is so implausible that it could not be ascribed to a different view or the product of
6 agency expertise."); Arizona Cattlegrower's Ass'n v. U.S. Fish & Wildlife, B.L.M. (9th Cir. 2001) 273 F.3d 1229,
7 1236 (holding judicial review under the "arbitrary and capricious" standard is "meaningless ... unless we carefully
8 review the record to ensure that agency decisions are founded on a reasoned evaluation of the relevant factors
9 ...[;] while reviewing courts should uphold reasonable and defensible constructions of an agency's enabling act,
10 they must not rubber-stamp ... administrative decisions that they deem inconsistent with a or that frustrate the
11 congressional policy underlying a statute.")

12 Second degree murder is not a crime automatically allows one to be deemed unsuitable for release and
13 parole. And, given the above directive in Environmental Defense Center, Inc. v. E.P.A and Arizona
14 Cattlegrower's Ass'n v. U.S. Fish & Wildlife, B.L.M., coupled with Rosenkrantz, Biggs, Martin, Morrall, Irons,
15 Coleman, et al., there must be a base set of factors upon which a second degree murderer would have to be
16 paroled or the BPH would risk violating due process. To determine what would qualify as more than the minimum
17 necessary for a conviction, the courts must first consider what is required, at the minimum, for a conviction of
18 second-degree murder.

19 The Second District Court of Appeals has explained, in In re Lawrence (2007, Rev. granted 9-21-
20 07), 59 Cal.Rptr.3d 537; "Combining the California and federal standards of review, as they have been
21 articulated thus far by the California Supreme Court, respectively, the commitment crime can lack the power to
22 supply "some evidence" supporting a denial of parole because of the interplay between two factors—the nature
23 of the crime and the passage of time since its commission. That is, the fact there is "some evidence" the crime
24 was committed and committed a certain way at a certain time does not mean that the crime necessarily
25 represents "some evidence" the prisoner's release on parole will pose an unreasonable risk of danger to the
26 public safety at the present time. Whether it possesses the necessary predictive value depends both on the
27 nature of the crime and how long ago it happened. ... Id. p. 558.

28 "When the Legislature sets an indeterminate maximum term with a fixed minimum term, the latter can be

viewed as setting the period of imprisonment deemed necessary to satisfy the first two purposes, while the justification for continued imprisonment beyond that fixed minimum depends on the need for continued incapacitation of the offender. California's sentencing structure in murder cases makes it clear the denial of parole can only be justified by the third of these purposes—the need for further incapacitation of the prisoner. Unless there is an *unreasonable risk* the parole applicant will re-offend and thus pose a risk to public safety she or he **is supposed to be released on parole**. Neither the Board nor the Governor properly takes account of whether release on parole will impair the retributive or the deterrent value of continued imprisonment at this late stage of the inmate's incarceration. (*Ibid.* p. 559. Emphasis added to original.)

“[R]eturning to the statutory test, only evidence bearing on the likelihood of recidivism and only to the extent it reveals an “unreasonable risk” of same is relevant to the decision whether to grant or deny parole. As a recent court of appeal opinion emphasized, a parole release decision authorizes the Board [] only to “identify and weigh the factors relevant to predicting ... “whether the inmate will be able to live in society *without committing additional antisocial acts.*”” *In re DeLuna* (2005) 126 Cal.App.4th 585, 591, quoting *Rosenkrantz V* at p. 655 (Emphasis in original); *Lawrence* , supra, p. 560.

The Sixth District Court of Appeals has explained that “[s]econd degree murder requires ... malice—i.e., the perpetrator must kill another person with the specific intent to do so; or he or she must cause another person's death by intentionally performing an act, knowing it is dangerous to life and with conscious disregard for life.” *In re smith* (2003) 114 Cal.App.4th 343, 366, citing P.C. §§ 187-189; and CALJIC No. 811. (Noting “all second degree murders by definition involve some callousness, i.e., lack of emotion or sympathy, emotional insensitivity, indifference to the feelings and suffering of others” and that the facts of the instant crime were callous, but not exceptionally callous.) *Id.* at pp. 366-7.

From this instructive dialog, the limits on the “minimum necessary to sustain a conviction” of second degree murder can be defined. There must be: 1) a killing of another, 2) malice, 3) no premedi-tation or deliberation, planning, lying in wait, torture, etc., as would be present in a first degree murder, a crime that Petitioner was specifically acquitted by a jury of his peers.

Now that the crime is defined, the question must be what evidence indicates that any particular second degree murder was somehow “beyond the minimum necessary to sustain a conviction.” In sum: what evidence indicates the commitment offense was “**especially** heinous” or “**exceptionally** grave”, given that there typically

1 must be a finding of some level of heinousness, callousness, and/or gravity of violence in order for a defendant
2 to have had his second degree murder conviction sustained by the appellate courts in the first place and where
3 Petitioner WAS NOT determined to be the unequivocal killer?

4 There was no weapon enhancement that could reasonably demonstrate that this crime was "beyond the
5 minimal elements" of a second-degree murder conviction, and is in no way some evidence establishing that he is
6 currently an unreasonable threat to public safety. Petitioner was not the shooter and lacked the requisite intent to
7 charge an enhancement. Indeed, if the BPH were to be able to rely on "weapon of choice" evidence in every
8 case, **every** second degree murder would be "beyond the minimal elements" and there would be no way to
9 commit a second degree murder in California that did not qualify as an "especially" heinous crime and thereby
10 justify imprisonment for life, without any chance of parole. This is not what the Legislature wrote the
11 enhancement statutes for nor the intended outcome of any additional punishment attached thereto, and exceeds
12 the bounds of common sense in every conceivable manner.

13 Having doubts as to these elements, the jury acquitted Petitioner of first degree murder and
14 returned a verdict of second degree murder and there has never been any contention by the appellate courts
15 that it should have been otherwise. The unique elements present here were duly recounted: (by **PRESIDING**
16 **COMMISSIONER ENG**): "Okay. I'm going to go back and take a look at some of your personal stuff. I thought
17 that – okay. You were born in Mexico? **INMATE JIMENEZ**: Yes, ma'am. **PRESIDING COMMISSIONER ENG**:
18 Okay. And you are one of seven children. Were you all born in Mexico? **INMATE JIMENEZ**: Just two weren't ,
19 the two youngest. **PRESIDING COMMISSIONER ENG**: Okay. So where are you in the seven? (sic) **INMATE**
20 **JIMENEZ**: Third. **PRESIDING COMMISSIONER ENG**: You're the third oldest? Okay. So the two youngest were
21 born here because it does state that both parents reside in Long Beach; is that correct? **INMATE JIMENEZ**: Yes,
22 ma'am. ... **PRESIDING COMMISSIONER ENG**: You ended up at Ply High you junior year you did not complete
23 (sic). So you dropped out of school in what, the 11th grade? **INMATE JIMENEZ**: Yes, ma'am. **PRESIDING**
24 **COMMISSIONER ENG**: Were you failing? **INMATE JIMENEZ**: Yes, yes. **PRESIDING COMMISSIONER ENG**: Is
25 that why you dropped out? **INMATE JIMENEZ**: Yes. **PRESIDING COMMISSIONER ENG**: So when you dropped
26 out what did you do? (sic) **INMATE JIMENEZ**: I worked for my brother-in-law some of that time, for about three
27 months. **PRESIDING COMMISSIONER ENG**: So it states here that your parents were having a tough time
28 meeting the needs of the large family, huh? **INMATE JIMENEZ**: Yes. **PRESIDING COMMISSIONER ENG**: so

1 did you feel because you were the third oldest you had to help them out? **INMATE JIMENEZ:** I wanted to
 2 contribute something. **PRESIDING COMMISSIONER ENG:** So you r older brother and you both had
 3 problems with the law? ... Did you look up to your older brother? **INMATE JIMENEZ:** Yes. **PRESIDING**
 4 **COMMISSIONER ENG:** so would you say that you were trying to be more like him? **INMATE JIMENEZ:** In some
 5 ways, yes. **PRESIDING COMMISSIONER ENG:** Do you think he was leaving (sic) a good example? **INMATE**
 6 **JIMENEZ:** At the time I did think that. **PRESIDING COMMISSIONER ENG:** *It says here that you stayed away*
 7 *from home at times rather than see your mother cry?* **INMATE JIMENEZ:** Yes, ma'am. **PRESIDING**
 8 **COMMISSIONER ENG:** **Your mother was not happy because she didn't have enough food for the family;**
 9 **is that true? ...** **INMATE JIMENEZ:** At times we had it like that. **PRESIDING COMMISSIONER ENG:** Why
 10 would your mother be crying? **INMATE JIMENEZ:** For the struggles (sic). **PRESIDING COMMISSIONER ENG:**
 11 Did they ever consider going back to Mexico? **INMATE JIMENEZ:** I think they probably did. **PRESIDING**
 12 **COMMISSIONER ENG:** Your father drank a lot? **INMATE JIMENEZ:** Yes. **PRESIDING COMMISSIONER ENG:**
 13 And it states here that he sometimes abused you mother physically? **INMATE JIMENEZ:** Yes. **PRESIDING**
 14 **COMMISSIONER ENG:** Did you ever witness your father beating your mother or hitting her or slapping her?
 15 **INMATE JIMENEZ:** Just slapping, pushing. **PRESIDING COMMISSIONER ENG:** Okay. Did he do that with the
 16 kids? **INMATE JIMENEZ:** No. **PRESIDING COMMISSIONER ENG:** *Just your mother."* Certainly not an ideal
 17 childhood nor appropriate role models for a culturally confused young boy who felt he had to leave school to help
 18 feed his family and survive as best he could. The courts have routinely noted at all levels that youth is not to be
 19 held to adult standards of behavior where the development of the person is still ongoing and not fully competent
 20 nor mature. (Exhibit "A", pages 23-27, emphasis added.)

21 Rosenkrantz VI 444 F.Supp.2d 1036 noted such a nexus insofar as age, maturity, situational factors and
 22 rage are concerned by stating:

23 "The reliability of the facts of his crime as a predictor for his dangerousness is further diminished
 24 by petitioner's age at the time of the offense. Petitioner turned 18 [**prior to the crime**], and
 25 committed his offense one month later. While *petitioner* was not legally a minor, he was very
 26 close to being one. ^{FN17} As the [U.S.] Supreme Court recently recognized, the
 27 evidentiary/predictive value of the conduct of such a young person is diminished. The
 28 susceptibility of juveniles to immature and irresponsible behavior means "**their irresponsible**
conduct is not as morally reprehensible as that of an adult." Thompson v. Oklahoma (1988)
 487 u.s. 815, 835 (plurality opinion). Their own vulnerability and comparative lack of control over
 their immediate surroundings mean **juveniles have a greater claim than adults to be forgiven**
for failing to escape negative influences in their WHOLE ENVIRONMENT. (Emphasis
 added.)

1 This rendition illustrates further, the importance (given the short tenure of the suggestion that "some
2 evidence" may be found in facts 'beyond the minimum necessary elements' of the commitment offense) of all
3 courts providing enhanced guidance regarding what set of facts are sufficient to support a denial of parole
4 suitability. Invariably, any such guidance should summarily relate to the relevance of the evidence; whether or
5 not it is substantial for federal due process purposes; its relevance and its reliability; and the reasonableness one
6 should exact in being able to conclude that the evidence sub-stantiates that the inmate is a CURRENT,
7 UNREASONABLE THREAT to the safety and security of the public and the ability to lawfully abide within the
8 community.

9 Sole reliance on the commitment offense to deny parole not only augurs the serious risk of being
10 arbitrary but is almost always counter-instructive. In the parole determination process, the panel is tasked with
11 assuring the Executive branch by determining if the prisoner is a CURRENT threat to the public safety. This
12 determination is, in total, the only decision that the BPH is sanctioned to make by the Penal Code and
13 Regulations codified for that purpose. All interpretations of mitigating and aggravating factors, and the weight
14 given to the special circumstances of the offense, merely go to instruct this final conclusion. "A determination of
15 unsuitability I simply shorthand for a finding that a prisoner CURRENTLY would pose an unreasonable risk of
16 danger if released at this time." Smith, supra, at p. 370, (citing C.C.R. § 2402(d), emphasis added.)

17
18 WHEREFORE, Petitioner respectfully submits these issues, arguments and Exhibits and prays this
19 Honorable Court and all Honorable Justices will grant the writ and Order Petitioner's release forth-with. Or, in the
20 alternative, Order a Rehearing within thirty (30) days of the Order with instructions to individualize his complete
21 suitability consideration without bias or political, personal, or considerations of tenure, and in accordance with the
22 statutory mandate of P.C. § 3041(a), and any further relief as the Court may deem just and proper to protect
23 Petitioner's civil rights.

24 ///

25 ///

26 ///

EXHIBIT "A"

SUBSEQUENT PAROLE CONSIDERATION HEARING

STATE OF CALIFORNIA

BOARD OF PAROLE HEARINGS

**INMATE
COPY**

In the matter of the Life)
Term Parole Consideration)
Hearing of:)
JOSE JIMENEZ)
_____)

CDC Number E-49850

CORRECTIONAL TRAINING FACILITY

SOLEDAD, CALIFORNIA

APRIL 12, 2007

11:58 A.M.

PANEL PRESENT:

JANICE ENG, Presiding Commissioner
JAMES MARTIN, Deputy Commissioner

OTHERS PRESENT:

JOSE JIMENEZ, Inmate
MARY ANN TARDIFF, Attorney for Inmate
DON EASTMAN, Deputy District Attorney
Correctional Officer(s) Unidentified

CORRECTIONS TO THE DECISION HAVE BEEN MADE

_____	No	See Review of Hearing
_____	Yes	Transcript Memorandum

Jill Pearson
Northern California Court Reporters

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P R O C E E D I N G S

DEPUTY COMMISSIONER MARTIN: We're on tape.

PRESIDING COMMISSIONER ENG: Okay. Good morning.

This is a subsequent parole consideration hearing for Jose Jimenez, CDC number E-49850. Today's date is April 11th, 2007 and the time is 11:58 a.m.. We are located at CTF, Soledad. The inmate was received on March 27, 1990 from Los Angeles County. His life term began on that same date, March 27, 1990 and the minimum eligible parole date is April 19, 1997. The controlling offense for which the inmate has been committed is murder two, case number A032130, count one, Penal Code Section 187. The inmate received a total term of 15 years to life. This hearing is being recorded so for the purpose of voice identification each of us will be required to state our first and last names, spelling out our last names. So, sir, when it comes to your turn after you spell your last name please provide us with your CDC number. I'll begin and we'll move around the room to the left. My name is Janice Eng, E-N-G, Commissioner.

DEPUTY COMMISSIONER MARTIN: I'm James Martin, M-A-R-T-I-N, Deputy Commissioner

DEPUTY DISTRICT ATTORNEY EASTMAN: Don Eastman, E-A-S-T-M-A-N, Deputy District Attorney, Los Angeles County.

ATTORNEY TARDIFF: Mary Ann Tardiff, T-A-R-D-I, double F, attorney for Mr. Jimenez.

1 **INMATE JIMENEZ:** Jose Jimenez, E-49850.

2 **PRESIDING COMMISSIONER ENG:** Did you spell your last
3 name, sir?

4 **INMATE JIMENEZ:** J-I-M-E-N-E-Z.

5 **PRESIDING COMMISSIONER ENG:** Okay. Thank you. We
6 also have two correctional officers for security reasons
7 and they will not be participating in the hearing.

8 Before we go any further, sir, I'm going to ask if
9 you could please read that ADA statement in front of you
10 aloud? You can begin.

11 **INMATE JIMENEZ:**

12 "The Americans with Disabilities Act, ADA,
13 is a law to help people with disabilities.
14 You have a right to receive help for your
15 hearing. If you need help talking, reading,
16 hearing, seeing, understanding or getting to
17 your hearing you have a right to that help.
18 You have a right to receive help in meeting
19 with your attorney. If you do not speak
20 English you have a right to an interpreter.
21 If you are deaf and use sign language you
22 have a right to a sign language interpreter.
23 If you cannot read the BPT or CDC must
24 provide you with help to read the forms and
25 papers. If you need special transportation
26 the BPT or CDC must provide it for you."

27 **PRESIDING COMMISSIONER ENG:** Okay. Thank you. Do

1 you understand what your rights are under the Americans with
2 Disabilities Act?

3 **INMATE JIMENEZ:** Yes.

4 **PRESIDING COMMISSIONER ENG:** Okay. I do note that
5 you signed a BPT form 1973 back on January 4th of 2007. And
6 that form, sir, is a Reasonable Accommodation Notice and
7 Request in accordance with the provisions under the ADA.
8 And basically, sir, you checked off that you do not have
9 any disabilities as defined under the ADA. So is that
10 information still correct and is current?

11 **INMATE JIMENEZ:** Yes, ma'am.

12 **PRESIDING COMMISSIONER ENG:** Okay. Sir, do you have
13 any problems walking up or down stairs or for distances of
14 a 100 yards or more?

15 **INMATE JIMENEZ:** No, ma'am.

16 **PRESIDING COMMISSIONER ENG:** All right. And I see
17 that you're wearing glasses. Are those for reading and
18 distance or --

19 **INMATE JIMENEZ:** No, just distance.

20 **PRESIDING COMMISSIONER ENG:** Just distance? So do
21 you have any problems, do you need any type of magnifying
22 device in order to read documents?

23 **INMATE JIMENEZ:** No.

24 **PRESIDING COMMISSIONER ENG:** Okay. So you should be
25 fine today?

26 **INMATE JIMENEZ:** Yes, ma'am.

27 **PRESIDING COMMISSIONER ENG:** Okay. How about any

1 hearing impairments?

2 **INMATE JIMENEZ:** No, ma'am.

3 **PRESIDING COMMISSIONER ENG:** Okay. Sir, have you
4 ever been included in the Triple CMS or EOP programs?

5 **INMATE JIMENEZ:** No, I haven't.

6 **PRESIDING COMMISSIONER ENG:** And do you know what
7 those are?

8 **INMATE JIMENEZ:** A little bit.

9 **PRESIDING COMMISSIONER ENG:** Okay. They come under
10 the mental health program umbrella. So you understand what
11 the mental health is?

12 **INMATE JIMENEZ:** Yes.

13 **PRESIDING COMMISSIONER ENG:** So Triple CMS is I
14 think it's the Clinical Case Management for some in the
15 institution and then the EOP is the Enhanced Outpatient
16 which deals with more severe mental health situations. The
17 Triple CMS is less severe and could include one on one
18 therapy, etcetera. Just so you know for future reference.

19 **INMATE JIMENEZ:** Okay, ma'am.

20 **PRESIDING COMMISSIONER ENG:** Most times you know it
21 if you're in it, okay? All right. So we'll check off, no.
22 Sir, do you know if you have taken any psychotropic
23 medications, either in prison or on the streets?

24 **INMATE JIMENEZ:** No.

25 **PRESIDING COMMISSIONER ENG:** Okay. And did you go
26 to school here in the U.S.?

27 **INMATE JIMENEZ:** Yes, I did.

1 **PRESIDING COMMISSIONER ENG:** You did? Oh, that's
2 what I thought, okay. And when you were growing up do you
3 recall were you in special education classes?

4 **INMATE JIMENEZ:** No, ma'am.

5 **PRESIDING COMMISSIONER ENG:** Okay. So do you suffer
6 from any disability that would prevent you from
7 participating in the hearing today?

8 **INMATE JIMENEZ:** No, ma'am.

9 **PRESIDING COMMISSIONER ENG:** Okay. Ms. Tardiff, are
10 there any ADA issues that you believe need further
11 discussion?

12 **ATTORNEY TARDIFF:** No.

13 **PRESIDING COMMISSIONER ENG:** Thank you.

14 Sir, this hearing is being conducted pursuant to the
15 Penal Code and the rules and regulations of the Board of
16 Parole Hearings Governing Parole Consideration Hearings for
17 Life Inmates. So the purpose of today's hearing is to once
18 again consider your suitability for parole. And in doing
19 so we will be considering the number and nature of the
20 crimes for which you were committed, your prior criminal
21 and social history, your behavior and programming since
22 your commitment and your plans if released. So we've had
23 the opportunity to review your Central File and you will
24 also be given a chance to make any corrections or to
25 clarify the record for us. We will be considering your
26 progress since your commitment, your counselor's reports
27 and your mental health evaluations. However, we will be

1 focusing also on any progress or new reports since your
2 last hearing. So if you have had any changes to your
3 parole plans you should bring that to our attention and I
4 believe we have already received some letters. Sir, we
5 will reach a decision today and inform you whether or not
6 we find you suitable for parole and the reasons for our
7 decision. So if you are found suitable for parole the
8 length of your confinement will be explained to you at that
9 time. Before we take a recess for deliberations the
10 district attorney's representative who is present, your
11 attorney and you yourself will all have a chance to make a
12 final statement regarding parole suitability. So if you
13 choose to make a final statement to the panel you should
14 focus on why you believe you are suitable for parole today.
15 Then we will then take a recess, we'll clear the room and
16 we'll begin our deliberations and once we complete the
17 deliberations we will resume the hearing and announce our
18 decision. The California Code of Regulations states that
19 regardless of time served a life inmate shall be found
20 unsuitable for and denied parole if in the judgment of the
21 panel the inmate would pose an unreasonable risk of danger
22 to society if released from prison. Sir, you do have
23 certain rights and those rights include the right to a
24 timely notice of this hearing, the right to review your
25 Central File and the right to present relevant documents.

26 So Ms. Tardiff, so far have your client's rights been
27 met?

1 **ATTORNEY TARDIFF:** Yes.

2 **PRESIDING COMMISSIONER ENG:** Sir, when did you --
3 when was the last time you reviewed your Central File? Did
4 you recently?

5 **INMATE JIMENEZ:** Yes, recently to prepare for the
6 board.

7 **PRESIDING COMMISSIONER ENG:** Okay. Good. I wanted
8 to be sure because I didn't see anything. Okay. Sir, you
9 have the additional right to be heard by an impartial
10 panel. You've been introduced to this panel do you have
11 any objections?

12 **INMATE JIMENEZ:** No, ma'am.

13 **PRESIDING COMMISSIONER ENG:** Okay. Ms. Tardiff, any
14 objections to the panel?

15 **ATTORNEY TARDIFF:** No.

16 **PRESIDING COMMISSIONER ENG:** Sir, you will receive a
17 copy of our written tentative decision today and that
18 decision does become final within 120 days.

19 **DEPUTY COMMISSIONER MARTIN:** May I interrupt you? I
20 see a general chrono in the Central File.

21 **PRESIDING COMMISSIONER ENG:** What's the date?

22 **DEPUTY COMMISSIONER MARTIN:** And it's dated January
23 4, 2007, that's fairly recently, and it has the signature
24 of Inmate Jimenez and the box that's checked is, *I decline*
25 *to review my Central File.*

26 **PRESIDING COMMISSIONER ENG:** Do you recall that?

27 **DEPUTY COMMISSIONER MARTIN:** (Overlapping) So I

1 thought I heard Mr. Jimenez say that he did review it.

2 **INMATE JIMENEZ:** Well, I had a chance to review it
3 but I --

4 **DEPUTY COMMISSIONER MARTIN:** (Overlapping) So
5 previously you said you did and now you're saying you
6 declined to review it; is that correct?

7 **INMATE JIMENEZ:** Yes.

8 **PRESIDING COMMISSIONER ENG:** Okay. So you didn't
9 review it, all right. Okay. Sir, a copy of the final
10 decision and a copy of the hearing transcript will be sent
11 to you. But please note on May 1st, 2004 the regulations
12 regarding your right to appeal a decision made at this
13 hearing were repealed. And you basically have to go to
14 court so if you have any questions about that policy you
15 should discuss that with your legal counsel or see about
16 getting a copy of it to review at your prison law library.
17 Sir, you're not required to admit to or discuss your
18 offense but this panel does accept as true the findings of
19 the court. So do you understand what that means?

20 **INMATE JIMENEZ:** Yes, ma'am.

21 **PRESIDING COMMISSIONER ENG:** Okay. Commissioner
22 Martin, is there any confidential material in the file and
23 if so will we be using it?

24 **DEPUTY COMMISSIONER MARTIN:** There is some
25 confidential material and it may be used.

26 **PRESIDING COMMISSIONER ENG:** All right, thank you.
27 I've already passed the hearing checklist over to

1 your legal counsel and also to the Deputy DA and we've all
2 initialed it and dated it and this is labeled Exhibit 1.
3 And, sir, we do this to make sure that all of us are
4 operating off the same set of documents for your hearing.

5 **ATTORNEY TARDIFF:** I don't have the most current
6 board report or is there one?

7 **PRESIDING COMMISSIONER ENG:** Actually it was in this
8 updated material. Is there an extra copy of it?

9 **ATTORNEY TARDIFF:** I got letters only.

10 **PRESIDING COMMISSIONER ENG:** All right. Hold on.

11 **ATTORNEY TARDIFF:** That's all right. I mean, if
12 you're going to --

13 **PRESIDING COMMISSIONER ENG:** (Overlapping) I have
14 letters too but in front of the letters was an updated
15 board report, May 2007.

16 **ATTORNEY TARDIFF:** Did you get a board report?

17 **DEPUTY DISTRICT ATTORNEY EASTMAN:** Yeah, if you want
18 to look at it.

19 **ATTORNEY TARDIFF:** I'll just look at this briefly.

20 **PRESIDING COMMISSIONER ENG:** I didn't leave it there
21 for you this morning?

22 **ATTORNEY TARDIFF:** No, I just got these two.

23 **PRESIDING COMMISSIONER ENG:** I must have --

24 **ATTORNEY TARDIFF:** No.

25 **PRESIDING COMMISSIONER ENG:** All right.

26 **ATTORNEY TARDIFF:** And also I'd like to make a
27 comment on the psych eval.

1 **PRESIDING COMMISSIONER ENG:** Yes.

2 **ATTORNEY TARDIFF:** There was one requested by the
3 prior board.

4 **PRESIDING COMMISSIONER ENG:** All right.

5 **ATTORNEY TARDIFF:** Mr. Jimenez was interviewed I
6 believe March 7th. As of yet that report has not been
7 received by Mr. Jimenez or anyone to my knowledge in this
8 room. He is willing to waive that psych eval in order to
9 go forward with this hearing.

10 **PRESIDING COMMISSIONER ENG:** Okay.

11 **ATTORNEY TARDIFF:** I spoke with him at length that,
12 you know, basically it was his choice. He could have the
13 psych and he would need to postpone it or he could go
14 forward with the hearing and waive it and he's chosen to --

15 **PRESIDING COMMISSIONER ENG:** (Overlapping) Move
16 forward.

17 **ATTORNEY TARDIFF:** -- waive the psych and move
18 forward.

19 **PRESIDING COMMISSIONER ENG:** All right. Sir, do you
20 understand that. The psychological evaluation is just one
21 of many factors that panels take a look at, it's not
22 usually a deciding factor one way or the other; do you
23 understand that?

24 **INMATE JIMENEZ:** Yes, ma'am.

25 **PRESIDING COMMISSIONER ENG:** Okay. All right. So
26 you are comfortable with moving forward today?

27 **INMATE JIMENEZ:** Yes.

11

1 **PRESIDING COMMISSIONER ENG:** Okay. Okay. So any
2 additional documents to be presented to the panel today
3 other than what we have? I see all these letters.

4 **ATTORNEY TARDIFF:** There may be.

5 **PRESIDING COMMISSIONER ENG:** Okay.

6 **ATTORNEY TARDIFF:** If there's some chronos that need
7 to be submitted during the hearing, we'll just pass them
8 over.

9 **PRESIDING COMMISSIONER ENG:** All right. And any
10 preliminary objections?

11 **ATTORNEY TARDIFF:** No.

12 **PRESIDING COMMISSIONER ENG:** Okay. And will your
13 client be speaking with the panel today?

14 **ATTORNEY TARDIFF:** Will you discuss with the panel?

15 **INMATE JIMENEZ:** (Overlapping) Yes.

16 **PRESIDING COMMISSIONER ENG:** Okay. On all matters?

17 **ATTORNEY TARDIFF:** Yes.

18 **INMATE JIMENEZ:** Yes.

19 **PRESIDING COMMISSIONER ENG:** Okay. Sir, I'll have
20 to swear you in, so please raise your right hand. Do you
21 solemnly swear or affirm that the testimony you give at
22 this hearing will be the truth, the whole truth and nothing
23 but the truth?

24 **ATTORNEY TARDIFF:** Yes.

25 **PRESIDING COMMISSIONER ENG:** Okay. Thank you. Sit
26 back and relax. As much as you can, I guess. What I'm
27 going to do first is read into the record the Statement of

1 Facts about the crime, okay? And I'm going to take that
2 from the probation officer's report which is in the legal
3 section of our packets, and I believe it starts on pages 2
4 through page 4, okay, and it states,

5 "On October 31st, 1985, defendant and
6 co-defendants beat victim Jose
7 Gonzalez to death. Victim among three
8 carloads of Eastside Longos gang
9 members advanced on the territory
10 occupied by the Barrio Pobre,
11 P-O-B-R-E, and T-Town Flats Gangs in
12 retaliation for earlier wrongs
13 perpetrated against them. They
14 confronted the rival gang members,
15 including defendant Jimenez (T-Town
16 Flats gang), co-defendant Martinez
17 (Barrio Pobre gang) and co-defendant
18 Lucero, L-U-C-E-R-O, (La Loma gang)
19 and a gang fight ensued. After five
20 to ten minutes the fight broke up and
21 the Eastside Longo gang members left
22 the area. However, victim was left
23 behind. According to witnesses,
24 co-defendant Lucero initially chased
25 the victim and knocked him to the
26 ground. Then the defendant and co-
27 defendants using a shovel, 2x4 with a

1 nail and a crowbar proceeded to
2 administer a brutal beating upon the
3 unarmed defenseless victim who lay on
4 the ground. Two female witnesses
5 intervened and after threatening these
6 witnesses the defendant left the
7 scene. Defendant Lucero, however,
8 returned to the victim and proceeded
9 to strike him with 2x4, knocking out
10 several teeth. Victim suffered
11 lacerations and punctures to the face,
12 chest and head and had many teeth
13 missing. He was admitted to the
14 hospital in serious condition and was
15 treated for one hour prior to surgery.
16 He died on November 4th, 1985 as a
17 result of the injuries received.
18 Following arrest and subsequent
19 interrogation, defendant after initial
20 denial acknowledged, quote, *I hit the*
21 *guy with the board in the side but not*
22 *with a nail*, unquote. He explained
23 that he was, quote, *kicking back*,
24 unquote, with some other gang members
25 when they were attacked by 15 to 20
26 Eastside Longos armed with sticks and
27 bottles. He subsequently borrowed a

--
1 gun and when the Eastside Longos saw
2 the gun they ran away. Defendant
3 reports that he was subsequently told
4 by a friend that one of the Longos was
5 laying down in the alley. Defendant
6 states that he was mad at the Longos
7 because they had jumped him prior to
8 this evening. So he proceeded to the
9 area, picked up a 4-foot long board
10 with a nail on one end and struck the
11 Longo who was lying on the ground.
12 Defendant denied striking the victim
13 with the nail end and reports that he
14 hit him only once, quote, *because he*
15 *was already so messed up*, unquote.
16 Defendant reports that when he struck
17 the victim, the victim moved a little
18 bit but did not say anything or try to
19 get up. Defendant left the scene but
20 as he looked back he saw his, quote,
21 *homeboys*, unquote, hitting the victim
22 some more. Defendant acknowledges
23 that the victim was not armed when he
24 struck him."

25 Okay. Sir, it was a while ago, back in 1985. Was that a
26 pretty accurate description of what occurred that night?

27 **INMATE JIMENEZ:** Yes, ma'am.

1 **PRESIDING COMMISSIONER ENG:** That was brutal -
2 --pretty brutal beating; don't you think?

3 **INMATE JIMENEZ:** Yes, it was, ma'am.

4 **PRESIDING COMMISSIONER ENG:** So what was really
5 going on between all of the -- there were a whole bunch of
6 people, right, there?

7 **INMATE JIMENEZ:** Yes.

8 **PRESIDING COMMISSIONER ENG:** And representing all
9 these different gangs; is that correct?

10 **INMATE JIMENEZ:** Yes, ma'am.

11 **PRESIDING COMMISSIONER ENG:** Okay. So why don't you
12 try to explain that to this panel, what was really
13 underlying all this. Was everybody against this Eastside
14 Longo gang?

15 **INMATE JIMENEZ:** Yes, at the time all three gangs
16 were rivals with that particular gang.

17 **PRESIDING COMMISSIONER ENG:** Would you say that the
18 gang that you were affiliated with, which I understand that
19 you had been affiliated with them since you were about 15
20 years of age; is that correct?

21 **INMATE JIMENEZ:** Yes, ma'am.

22 **PRESIDING COMMISSIONER ENG:** Okay. So the T-Town
23 Flats gang, were all of you guys friendly with La Loma and
24 Barrio gang?

25 **INMATE JIMENEZ:** Yes.

26 **PRESIDING COMMISSIONER ENG:** Or did you often get
27 into altercations with each other?

1 **INMATE JIMENEZ:** No, at the time we didn't have any
2 problems with each other.

3 **PRESIDING COMMISSIONER ENG:** And was there ever a
4 time that your gang was on friendlier terms with the
5 Eastside Longo gang?

6 **INMATE JIMENEZ:** Yes, there was a time.

7 **PRESIDING COMMISSIONER ENG:** Was it recent before
8 this October '85 incident?

9 **INMATE JIMENEZ:** I think it was recent.

10 **PRESIDING COMMISSIONER ENG:** Um-hmm. So what caused
11 this escalation?

12 **INMATE JIMENEZ:** That incident, with me being a
13 T-town; I was in the Barrio Pobre visiting my girlfriend at
14 that time and I had heard that somebody from Eastside Longo
15 had disrespected a guy from BP and his girlfriend at a gas
16 station. But I didn't really pay too much attention to
17 everything because I was just there visiting a girlfriend.
18 And they had said that the Eastside Longo was going to go
19 there and cause problems, you know, fight. And sure
20 enough, soon after they had told him that they were going
21 to go, they came. And there was about two, two, three
22 carloads of them. They were walking down the street with
23 sticks, knives and, you know, and when the guys from BP and
24 everybody else saw them they all ran, you know, just to
25 protect themselves. I ran with my girlfriend inside her
26 house. And as we were in there we heard them, you know,
27 fighting. When my girlfriend's father took out a gun I

1 grabbed it from him with the intent of just scaring them
2 away from there. I came out, ran out of the house into the
3 front and I pointed it at some of them that were there.
4 When they seen it they ran.

5 **PRESIDING COMMISSIONER ENG:** Okay. Wait one second.
6 Are you telling this panel your girlfriend's father pulled
7 out a gun and gave it to you to use?

8 **INMATE JIMENEZ:** No, he didn't give it to me, I
9 grabbed it. I took it from him.

10 **PRESIDING COMMISSIONER ENG:** What do you think he
11 was intending to do when he took out a gun?

12 **INMATE JIMENEZ:** Just to scare them, to shoot up,
13 because I don't think it even had bullets.

14 **PRESIDING COMMISSIONER ENG:** So you're not sure
15 about that then?

16 **INMATE JIMENEZ:** Because he had said, he told me it
17 didn't have bullets. That's when I grabbed it.

18 **PRESIDING COMMISSIONER ENG:** Did anybody -- did it
19 ever occur to anybody to call the police?

20 **INMATE JIMENEZ:** I'm pretty sure somebody did.

21 **PRESIDING COMMISSIONER ENG:** All right. So you went
22 out and waved the gun, they saw that and they took off?

23 **INMATE JIMENEZ:** Yes.

24 **PRESIDING COMMISSIONER ENG:** Correct, okay. Now let
25 me ask you something else. In prior meetings between all
26 these different gang guys, okay, typically out of these
27 four gangs were the gang members usually armed with weapons

1 other than sticks and clubs and stuff? Was it very typical
2 to have weapons such as guns and more knives?

3 **INMATE JIMENEZ:** From what I remember growing up,
4 yeah it was typical for a gangbanger to carry knives.

5 **PRESIDING COMMISSIONER ENG:** How about loaded guns?

6 **INMATE JIMENEZ:** Guns.

7 **PRESIDING COMMISSIONER ENG:** There was. So did it
8 occur to you that even though you grabbed your girlfriend's
9 father's gun, even though it didn't have any bullets, you
10 didn't think that if you'd gone outside and waved that, did
11 you think about one of these, who are they, Longo, Eastside
12 Longo gang members pulling out their gun and shooting you?

13 **INMATE JIMENEZ:** That's how naïve I was, ma'am at
14 the time.

15 **PRESIDING COMMISSIONER ENG:** Well, would that have
16 been typical?

17 **INMATE JIMENEZ:** Yes.

18 **PRESIDING COMMISSIONER ENG:** So the scenario could
19 have been, there could have been, you know, you could have
20 been shot dead or you could have shot up a couple more
21 people, too.

22 **INMATE JIMENEZ:** Yes, ma'am.

23 **PRESIDING COMMISSIONER ENG:** When all this occurred,
24 just by having that weapon, not being sure if it was armed
25 or not, and you could easily have let loose. Okay. So you
26 did that, all right, and then -- I mean I'm just trying to
27 understand. Can you explain to this panel what possessed

1 you to participate in this type of a beating, this is one
2 guy. I mean what kind of chance would he have, how could
3 one person fight back against all these other people that
4 have boards and bats or what have you and he's lying on the
5 ground? Is this a guy that hurt you before or was it what
6 he represented?

7 **INMATE JIMENEZ:** It was the fact that he was from a
8 gang that we didn't get along with and it had just been a
9 constant fight between us and them.

10 **PRESIDING COMMISSIONER ENG:** But the constant fight,
11 how do you describe the constant fight? Was it basically
12 beatings or was it killing?

13 **INMATE JIMENEZ:** If they would have saw me walking
14 down the street and they would have known that I was from
15 T-Town Flats, just that was an excuse or a reason for them
16 to either chase me or if they had knives they would have
17 stabbed me or if they guns they would have shot me.
18 There's a just a hatred, gang rivalry at the time.

19 **PRESIDING COMMISSIONER ENG:** Okay. I'm going to
20 take a look at your background, get a better idea. We'll
21 get back to talking more about what was going through your
22 head in the crime. If we take a look at your prior record,
23 I mean, number one you were born on September 16th, 1968; is
24 that correct?

25 **INMATE JIMENEZ:** Yes, ma'am.

26 **PRESIDING COMMISSIONER ENG:** So you were 17 at the
27 time that this life crime occurred; is that correct?

20

1 **INMATE JIMENEZ:** Yes, ma'am.

2 **PRESIDING COMMISSIONER ENG:** And you're now 38?

3 **INMATE JIMENEZ:** Yes, ma'am.

4 **PRESIDING COMMISSIONER ENG:** Okay. And we'll get
5 back to your personal history. However, even at 17 being
6 arrested for this life crime, that was not your first
7 contact with law enforcement?

8 **INMATE JIMENEZ:** No, it was not.

9 **PRESIDING COMMISSIONER ENG:** Your first contact that
10 we have on record, at least I have here out of the
11 probation officer's report dates back to April 21st, 1983
12 when you were 14.

13 **INMATE JIMENEZ:** Yes, ma'am.

14 **PRESIDING COMMISSIONER ENG:** Do you recall that?

15 **INMATE JIMENEZ:** Yes, ma'am.

16 **PRESIDING COMMISSIONER ENG:** Assault with a deadly
17 weapon, specifically I believe it was a screwdriver. You
18 were declared a ward of the court and placed in CCP. It
19 states that you reported that you intervened in a fight
20 between the victim and his brother. Is that your brother,
21 sir?

22 **INMATE JIMENEZ:** My brother.

23 **PRESIDING COMMISSIONER ENG:** Okay. The victim knew
24 karate and the defendant armed himself with a screwdriver
25 in order to defend himself. And that you stated that your
26 brother shot the victim?

27 **INMATE JIMENEZ:** Yes, ma'am.

1 **PRESIDING COMMISSIONER ENG:** Is that true? And you
2 were accused of stabbing him.

3 **INMATE JIMENEZ:** Yes, ma'am.

4 **PRESIDING COMMISSIONER ENG:** And you stated that you
5 spent 36 weeks at camp. All right. Is this an older
6 brother of yours?

7 **INMATE JIMENEZ:** Yes.

8 **PRESIDING COMMISSIONER ENG:** Was he an adult or was
9 he a juvenile?

10 **INMATE JIMENEZ:** No, he was a juvenile.

11 **PRESIDING COMMISSIONER ENG:** He was a juvenile? So,
12 okay, what happened to the victim?

13 **INMATE JIMENEZ:** Umm --

14 **PRESIDING COMMISSIONER ENG:** Did he live?

15 **INMATE JIMENEZ:** Yes, ma'am.

16 **PRESIDING COMMISSIONER ENG:** Okay. So was this a
17 gang incident too?

18 **INMATE JIMENEZ:** No, not quite. This was a time
19 when there was a friend of mine, he was under the influence
20 of alcohol and some other drug, he seen this person on a
21 moped and he wanted to go over and take it from him and the
22 person, you know, of course he's going to, you know, defend
23 what's is and he got off his motorcycle, his moped and he
24 started, you know, defending himself. I went over there
25 to try to get my friend, you know, to pull him back, get
26 him away from that because he wasn't thinking right. And
27 the man on the moped, he wanted to charge me too because he

1 thought I was going to go and help him.

2 **PRESIDING COMMISSIONER ENG:** Right.

3 **INMATE JIMENEZ:** So what I did was I went over and
4 called my brother and we were at our friend's house and my
5 brother happened to be there. And I told him, *hey, there's*
6 *a guy beating our friend up.* I don't even remember his
7 name. But I didn't know my brother had a gun and so we
8 both went to go back and our friend was still, you know,
9 being beat up. And without thinking, you know, when he
10 seen us, he was going to charge at us today but my brother
11 didn't give him time to react or anything, he just came and
12 he shot him.

13 **PRESIDING COMMISSIONER ENG:** Did you stab him after?

14 **INMATE JIMENEZ:** I attempted to stab him?

15 **PRESIDING COMMISSIONER ENG:** After your brother shot
16 him?

17 **INMATE JIMENEZ:** During.

18 **PRESIDING COMMISSIONER ENG:** At the same time? And
19 now, so that was in '83 and then in December of '84 when
20 you were about 16, it says you violated probation? States
21 that you relate that you were with a girlfriend who had a
22 lit PCP cigarette and that you were merely holding it for
23 her but you received 18 days of juvenile hall and then were
24 released. So do you recall that?

25 **INMATE JIMENEZ:** Yes, ma'am.

26 **PRESIDING COMMISSIONER ENG:** Is that true?

27 **INMATE JIMENEZ:** Yes, ma'am.

1 **PRESIDING COMMISSIONER ENG:** And it also says
2 according to probation records you were found in violation
3 of probation for being truant. And then six months later
4 in June of 85 another violation of probation, this one says
5 for failure to report to the probation officer and follow
6 the school program. Then another 55 days in juvenile hall
7 pursuant to Ricardo M -- whatever time -- with 30 days
8 stay. And you acknowledge failure to report to the
9 probation officer leading to the issuance of a bench
10 warrant and you did end up serving 15 days in juvenile
11 hall. So this was becoming sort of a regular thing with
12 you, wasn't it?

13 **INMATE JIMENEZ:** Yes, ma'am.

14 **PRESIDING COMMISSIONER ENG:** So you were at camp but
15 apparently that did nothing to curtail your activities.

16 **INMATE JIMENEZ:** No, ma'am.

17 **PRESIDING COMMISSIONER ENG:** Was your brother in a
18 gang, too?

19 **INMATE JIMENEZ:** Yes, ma'am.

20 **PRESIDING COMMISSIONER ENG:** Okay. I'm going to go
21 back and take a look at some of your personal stuff. I
22 thought that -- okay. You were born in Mexico?

23 **INMATE JIMENEZ:** Yes, ma'am.

24 **PRESIDING COMMISSIONER ENG:** Okay. And you are one
25 of seven children. Were all of you born down in Mexico?

26 **INMATE JIMENEZ:** Just two weren't, the two youngest.

27 **PRESIDING COMMISSIONER ENG:** Okay. So where are you

1 alcohol, but I never could say that I was a --

2 **PRESIDING COMMISSIONER ENG:** A drinker?

3 **INMATE JIMENEZ:** Yeah, a drinker.

4 **PRESIDING COMMISSIONER ENG:** Do you think seeing
5 your father drinking a lot had anything to do with it?

6 **INMATE JIMENEZ:** It probably had something to do
7 with me not wanting to drink, I mean not following in his
8 steps.

9 **PRESIDING COMMISSIONER ENG:** Right, okay. But what
10 were the drugs that you were using, was it pot and PCP or
11 did you try more?

12 **INMATE JIMENEZ:** Mostly pot.

13 **PRESIDING COMMISSIONER ENG:** Mostly pot?

14 **INMATE JIMENEZ:** Um-hmm.

15 **PRESIDING COMMISSIONER ENG:** How often would you get
16 high?

17 **INMATE JIMENEZ:** I'd say probably twice a week or
18 once or twice a week.

19 **PRESIDING COMMISSIONER ENG:** So when you look back
20 would you say, what? Really light, occasional user,
21 moderate, more than moderate?

22 **INMATE JIMENEZ:** Light.

23 **PRESIDING COMMISSIONER ENG:** Okay. Did I miss
24 anything regarding your criminal background in terms of all
25 your juvenile record?

26 **INMATE JIMENEZ:** I believe that's it, ma'am.

27 **PRESIDING COMMISSIONER ENG:** Yeah. So basically a

1 lot of this occurred over a three-year period?

2 **INMATE JIMENEZ:** Yes.

3 **PRESIDING COMMISSIONER ENG:** Okay. Did you own a
4 gun?

5 **INMATE JIMENEZ:** No, ma'am.

6 **PRESIDING COMMISSIONER ENG:** Where's your brother
7 today, your older brother?

8 **INMATE JIMENEZ:** I believe he's locked up.

9 **PRESIDING COMMISSIONER ENG:** Is he in on a life
10 crime?

11 **INMATE JIMENEZ:** What was that, ma'am?

12 **PRESIDING COMMISSIONER ENG:** Is he in on a life
13 crime?

14 **INMATE JIMENEZ:** No, no, ma'am.

15 **PRESIDING COMMISSIONER ENG:** Okay. So why don't you
16 explain to this panel what was attractive to you, why did
17 you seek out T-Town gang?

18 **INMATE JIMENEZ:** It was just a group of friends that
19 I chose to hang around with at the time, it just seemed for
20 a kid, it just seems fun, you know, just having fun. To a
21 kid, of course, things seem like a game or fun, you know,
22 you're out there just meeting girls and going to parties
23 and that attracted me, you know, those type of things, you
24 know. The way, you know, the dressing style.

25 **PRESIDING COMMISSIONER ENG:** Was this the same gang
26 your brother was in?

27 **INMATE JIMENEZ:** Yes, ma'am.

1 **PRESIDING COMMISSIONER ENG:** So you were sort of an
2 automatic in; is that how it worked?

3 **INMATE JIMENEZ:** Yeah.

4 **PRESIDING COMMISSIONER ENG:** And did you see this as
5 normal?

6 **INMATE JIMENEZ:** Yes.

7 **PRESIDING COMMISSIONER ENG:** Did you believe that,
8 you know, fighting and possibly hurting other people with
9 weapons, was that sort of a normal way of life?

10 **INMATE JIMENEZ:** In some ways, yes.

11 **PRESIDING COMMISSIONER ENG:** And taking what you
12 want even though it's not yours?

13 **INMATE JIMENEZ:** Yes, in some ways, yes.

14 **PRESIDING COMMISSIONER ENG:** And where did you --
15 Where do you think you learned that set of values; you
16 understand what I'm talking about?

17 **INMATE JIMENEZ:** No, I really don't.

18 **PRESIDING COMMISSIONER ENG:** Did your parents have
19 anything to do with it?

20 **INMATE JIMENEZ:** No, because they tried, you know,
21 to show us the importance of work and education, but they
22 just didn't know how. Because they didn't have the
23 education, knowledge of like parenting, you know, they
24 didn't have that schooling. So they tried, you know, by
25 punishing us, by grounding us and things like that.

26 **PRESIDING COMMISSIONER ENG:** Well, would you say
27 that you understood back then what was right from wrong or

1 what was legal versus illegal?

2 **INMATE JIMENEZ:** No, I didn't, I did not understand.

3 **PRESIDING COMMISSIONER ENG:** Did you have any
4 understanding that if you did something that there could be
5 repercussions for it?

6 **INMATE JIMENEZ:** A little bit.

7 **PRESIDING COMMISSIONER ENG:** So you didn't really
8 understand about following laws or following the rules?

9 **INMATE JIMENEZ:** Yeah, a little bit but still not
10 quite to the -- what do you say -- to the point where I
11 would completely understand, you know, the consequences and
12 things like that. Or I might not have taken it as serious,
13 you know, as a normal person would.

14 **PRESIDING COMMISSIONER ENG:** I have to ask this
15 question. If you were by yourself and you had beaten up
16 this particular person, okay, this victim, Jose Gonzales,
17 if it had just been you and he and you beat him over the
18 head with a board and left him there, back then did you
19 think there would be any consequences for doing that?

20 **INMATE JIMENEZ:** At the moment, no.

21 **PRESIDING COMMISSIONER ENG:** Or even right after?

22 **INMATE JIMENEZ:** Maybe right after.

23 **PRESIDING COMMISSIONER ENG:** And what did you think
24 the consequences might be? What's the first thought?
25 Would it have to do with the gang? Gang retaliation?

26 **INMATE JIMENEZ:** That.

27 **PRESIDING COMMISSIONER ENG:** So you wouldn't have

1 thought about law enforcement?

2 **INMATE JIMENEZ:** No.

3 **PRESIDING COMMISSIONER ENG:** Your first thought
4 would have been, *oh God, the Longo guys are going to be*
5 *after me*; is that what you're saying? Okay. You
6 understand why I'm asking. I'm trying to understand what
7 your mentality was back then. So the rules according to
8 you, from what I'm getting, is the rules of the road back
9 then were really run by the gang and had nothing to do with
10 the rest of society?

11 **INMATE JIMENEZ:** Yeah.

12 **PRESIDING COMMISSIONER ENG:** Okay. Do you ever
13 think of it like that?

14 **INMATE JIMENEZ:** Now, I do.

15 **PRESIDING COMMISSIONER ENG:** Okay. We'll probably
16 get back to asking you more questions. Right now I'm going
17 to pass it over to my fellow commissioner, and if he's got
18 any follow up questions he'll just ask them. And then
19 he'll bring us up to date on what you've been doing.

20 **DEPUTY COMMISSIONER MARTIN:** A few questions, thank
21 you, Commissioner.

22 What was the date of your life crime?

23 **INMATE JIMENEZ:** Excuse me?

24 **DEPUTY COMMISSIONER MARTIN:** What was the date of
25 your life crime?

26 **INMATE JIMENEZ:** The day when I got arrested, right?

27 **DEPUTY COMMISSIONER MARTIN:** No, how about the night

1 you killed the victim?

2 **INMATE JIMENEZ:** The 31st of October, '85.

3 **DEPUTY COMMISSIONER MARTIN:** 10/31/85. You were
4 received in CDC in March of '90; am I correct?

5 **INMATE JIMENEZ:** Yes, sir.

6 **DEPUTY COMMISSIONER MARTIN:** Why the gap, what was
7 going on? Were you in county?

8 **INMATE JIMENEZ:** I was sentenced to the Youth
9 Authority.

10 **DEPUTY COMMISSIONER MARTIN:** Okay. So you did youth
11 authority and then at what age did you come to CDC?

12 **INMATE JIMENEZ:** At 21.

13 **DEPUTY COMMISSIONER MARTIN:** At 21 you came to the
14 Department of Corrections?

15 **INMATE JIMENEZ:** Yes, sir.

16 **DEPUTY COMMISSIONER MARTIN:** Mr. Jimenez, I think
17 you answered one question honestly a minute ago when the
18 commissioner asked you why did you seek out the gang. And
19 you said, *it was fun*. I think you enjoyed life in the
20 gang, didn't you?

21 **INMATE JIMENEZ:** Yeah, not quite in the gang, but
22 the lifestyle.

23 **DEPUTY COMMISSIONER MARTIN:** You identified with it,
24 didn't you?

25 **INMATE JIMENEZ:** Yes.

26 **DEPUTY COMMISSIONER MARTIN:** There have been a
27 couple of sort of sub-themes in the story you've told so

1 far. One was the moped incident. You portrayed yourself
2 in that story as you went to pull your friend back and in
3 the life crime I read where you left and turned around and
4 saw that others were still beating so you often tell the
5 story where you're trying to change the destiny of the
6 event or you're trying to save the person or you're
7 withdrawing but the other bad guys are carrying on. You do
8 that, don't you?

9 **INMATE JIMENEZ:** I don't understand.

10 **DEPUTY COMMISSIONER MARTIN:** I'm putting to you that
11 you often portray yourself as a savior or a lesser, a
12 lesser participant in an event. But I'm getting the
13 impression that you enjoyed those events. I'm getting the
14 impression that the stuff that the gang did was fun to you.
15 The property crimes, it was fun. It was fun to steal and
16 the drugs, the PCP, you were in that era of PCP. And even
17 the anti-person crime, you beating some guy up was fun,
18 wasn't it?

19 **INMATE JIMENEZ:** It was at that time, yeah.

20 **DEPUTY COMMISSIONER MARTIN:** Yeah, it was. I don't
21 think you had any empathy for other people's suffering.
22 You were young, you thought you were going to live a
23 thousand years and it was fun to just run around and do
24 that. You talk about your mom crying because there wasn't
25 enough food on the table. You know, 1985 was the time of a
26 booming economy, full employment, you could have got a job
27 somewhere, even if it was flipping burgers, couldn't you?

1 **INMATE JIMENEZ:** At that time they wouldn't have
2 hired me because I was on probation.

3 **DEPUTY COMMISSIONER MARTIN:** So is that the reason
4 why you couldn't go to work, because you were on probation.
5 Nobody on probation in 1985 had a job?

6 **INMATE JIMENEZ:** I tried.

7 **DEPUTY COMMISSIONER MARTIN:** So your mom cries and
8 you honor that by participating in the property crimes, the
9 anti-person crimes, the drug life. You honor your parents
10 that way instead of going out and getting a job and
11 contributing, putting food on the table so your mom won't
12 cry.

13 Commissioner, with your permission I'll talk about
14 Mr. Jimenez's institutional adjustment?

15 **PRESIDING COMMISSIONER ENG:** Um-hmm.

16 **DEPUTY COMMISSIONER MARTIN:** Mr. Jimenez, I reviewed
17 your C-File, Post-Conviction Progress Report, Correctional
18 Counselor Juan Garcia does the Life Prisoner Evaluation
19 Report for the 2004 calendar, I might have a newer one.
20 And then there was a psych report, goes back to February of
21 2005 by Dr. Hewchuk, h-e-w-c-h-u-k. As mentioned earlier
22 you were received at CDC, what did I say, March 27, 1990.
23 You came to CTF, I think you came twice. I think you were
24 here once and you left and you came back and I think most
25 recently it was June 5th, 1997. You were received medium A
26 custody, you have a classification score of 19, which is
27 good low points, and you have an INS hold on you; is that

1 correct?

2 **INMATE JIMENEZ:** Yes, sir.

3 **DEPUTY COMMISSIONER MARTIN:** Why is that?

4 **INMATE JIMENEZ:** I was born in Mexico and I never
5 had a chance to be --

6 **DEPUTY COMMISSIONER MARTIN:** Naturalized.

7 **INMATE JIMENEZ:** Naturalized.

8 **DEPUTY COMMISSIONER MARTIN:** Okay. I go to the
9 vocation and work as the first category. I found this
10 certificate for Vocational Print Technologies. You have
11 chronos, I found a couple in 2004, September and December
12 of 2004 where you have satisfactory grades and you
13 completed that vocation, correct?

14 **INMATE JIMENEZ:** Yes.

15 **DEPUTY COMMISSIONER MARTIN:** Any other vocations
16 that you've completed?

17 **INMATE JIMENEZ:** The print shop.

18 **DEPUTY COMMISSIONER MARTIN:** Print technologies,
19 that's the one we're talking about.

20 **INMATE JIMENEZ:** Landscaping.

21 **DEPUTY COMMISSIONER MARTIN:** I saw a certificate, I
22 didn't -- I saw an acknowledgement but I didn't see a
23 certificate for completing that. Are you saying it was
24 completed? I'll check on that. And then what's your
25 current assignment? Are you culinary?

26 **INMATE JIMENEZ:** Vocational computer repair.

27 **DEPUTY COMMISSIONER MARTIN:** Okay. Back in May of

1 '05 you were culinary for a brief period of time. I didn't
2 know if you were still there. All right. Do you have any
3 physical disabilities?

4 **INMATE JIMENEZ:** No, sir.

5 **DEPUTY COMMISSIONER MARTIN:** Okay. Sometimes guys
6 get into computer things if they can't do other jobs. How
7 do you like the computer?

8 **INMATE JIMENEZ:** It's fun.

9 **DEPUTY COMMISSIONER MARTIN:** Good, okay. I did not
10 find any academic upgrades. Are you in school or taking
11 any course, anything like that?

12 **INMATE JIMENEZ:** I'm not at the moment.

13 **DEPUTY COMMISSIONER MARTIN:** Okay. That's all
14 right. Do you read on your own? Do you do any self-study?

15 **INMATE JIMENEZ:** Yes, sir.

16 **DEPUTY COMMISSIONER MARTIN:** What do you like to
17 read?

18 **INMATE JIMENEZ:** Well, mostly Christian literature.

19 **DEPUTY COMMISSIONER MARTIN:** Okay. Going to the
20 category of self-help, I see you have participated in AA.
21 I found a couple of chronos, actually three chronos from
22 2004 and more recently there were four chronos from 2006.
23 They're all dated October the 8th but they gave you credit
24 for the four quarters of 2006, first, second, third and
25 fourth quarter. And so you had consistent participation in
26 2006. I also found a chrono dated October of '06 for Anger
27 Management. You did twelve sessions, I think it was in

1 Cage Your Rage.

2 INMATE JIMENEZ: Yes.

3 DEPUTY COMMISSIONER MARTIN: And there was a
4 certificate or a diploma for that.

5 INMATE JIMENEZ: Yes.

6 DEPUTY COMMISSIONER MARTIN: You were in the BRAG
7 group and for that you have a certificate for July of '06.

8 INMATE JIMENEZ: Yes.

9 DEPUTY COMMISSIONER MARTIN: Good. Anything else?

10 INMATE JIMENEZ: There was another class, a marriage
11 relationship.

12 DEPUTY COMMISSIONER MARTIN: Okay. And I see
13 there's a chrono in here for you to be allowed to wear a
14 ring. I see you're married; is that correct?

15 INMATE JIMENEZ: Yes, sir.

16 DEPUTY COMMISSIONER MARTIN: How long has that been
17 going on?

18 INMATE JIMENEZ: This is my fourth month.

19 DEPUTY COMMISSIONER MARTIN: Oh, okay. So it's
20 recent?

21 INMATE JIMENEZ: Yes.

22 DEPUTY COMMISSIONER MARTIN: Okay. Well, good luck
23 on that.

24 INMATE JIMENEZ: Thank you.

25 DEPUTY COMMISSIONER MARTIN: We'll go to the
26 category of disciplinaries. You have six 128s, the last
27 one, it goes back a ways, the last one goes back to 1995,

1 that's September of '95 you were absent from an assignment.
2 That didn't bother me too much but I'm going to go back two
3 prior to that, you have a prior one of, no, I'm sorry,
4 August the 25th, 1992, aggressive and disrespectful
5 behavior; what was that all about?

6 **INMATE JIMENEZ:** I don't even remember.

7 **DEPUTY COMMISSIONER MARTIN:** Okay. Well, how about
8 this. The CO who was supervising the steam line said to
9 give him your ID card, you said you didn't have an ID card.
10 He said, *well, you can't work here without one. You said*
11 *you had left it in your cell. The CO quotes himself*
12 *saying, so, if I got you on that wall and I pat you down I*
13 *won't find an ID card?* You reached in your shirt pocket,
14 removed your ID card, this is after you denied having it
15 twice, gave it to the CO and said, *quote, here's my fucking*
16 *ID card, I don't give a fuck.* And you continued to display
17 aggressive and disrespectful behavior. Attempts to
18 verbally counsel Inmate Jimenez were unsuccessful. I'm
19 assuming that the CO was trying to talk you down. Your
20 reply to that was, *I don't give a fuck about this job. I*
21 *didn't want this fucking job to begin with, they just gave*
22 *it to me, etcetera.* So that wasn't a particularly pleasant
23 discourse between you and the correctional officer. What
24 was going on there, bad day or what?

25 **INMATE JIMENEZ:** Yes, I guess it was, sir.

26 **DEPUTY COMMISSIONER MARTIN:** And then regarding your
27 115s, you've only got one and that's good. You've been

1 down a while and you only have one and that was for failure
2 to get in a prone position during the alarm. I guess you
3 were out in the yard, you were sitting on a wall, they
4 sound the horn or they do whatever they do and you were
5 sitting on a wall and the CO said, get down. And the 115
6 reads that you refused and you remained sitting. The CO
7 approaches and again orders you to get down, prone
8 position. *Jimenez continued to refuse my order, began*
9 *stating, I am down, why do I have to get in the prone*
10 *position.* So here we've got a sort of alarm going off and
11 the CO is, you know, you're refusing an order. Jimenez
12 non-receptive to counseling, etcetera. That sounds a lot
13 like the 128, you just get in a mood and you just don't
14 want to do anything, right?

15 **INMATE JIMENEZ:** In this particular case I had just
16 gone to Lancaster, a new prison, at that time from here. I
17 went over there from here. And I didn't know anything
18 about the prone position because if the alarm goes off,
19 when the alarm goes off you normally just sit down and it's
20 all right. But over there, I had just got there, it was
21 like about two weeks after I got there and I did what I was
22 doing over here which other people were doing the same
23 thing and I had my back towards the officer when he was
24 yelling so I couldn't tell who he was yelling at. And
25 that's when he came straight to me and I tried to explain
26 to him that I just got there.

27 **DEPUTY COMMISSIONER MARTIN:** Well, if he says, get

1 *in the prone position*, why not just hit the deck? He
2 didn't want to hear your life story?

3 **INMATE JIMENEZ:** I just didn't understand it.

4 **DEPUTY COMMISSIONER MARTIN:** Okay. I did look and
5 you're right, it was at that institution. So let's now go
6 to the category of the psych eval. The 2003 psych eval
7 that commented on your risk quotient, those are my words,
8 but it describes you has as having a moderate degree of
9 threat to the public. Counsel, that's 2003 psych eval.

10 The next year in 2004 --

11 **ATTORNEY TARDIFF:** (Overlapping) I don't have a
12 2003. I have a 2002 and then I got an '05.

13 **DEPUTY COMMISSIONER MARTIN:** Uh-oh.

14 **PRESIDING COMMISSIONER ENG:** Wait a minute.

15 **ATTORNEY TARDIFF:** I have a 7/02, July 5th.

16 **PRESIDING COMMISSIONER ENG:** Yeah, that's what we
17 have on ours, July 5th, 2002.

18 **DEPUTY COMMISSIONER MARTIN:** Well, I can go back to
19 the 2002 and comment that the Axis I refers to
20 polysubstance abuse, in institutional remission; Axis II,
21 no contributory personality disorder with a GAF score of
22 80.

23 **PRESIDING COMMISSIONER ENG:** Commissioner, there's a
24 2003?

25 **DEPUTY COMMISSIONER MARTIN:** That's -- I made that
26 note.

27 **ATTORNEY TARDIFF:** Is it the same inmate, you might

1 want to -- sometimes they put the wrong --

2 **DEPUTY COMMISSIONER MARTIN:** (Overlapping) You know,
3 you might be right, but I thought I --

4 **ATTORNEY TARDIFF:** I mean, you --

5 **PRESIDING COMMISSIONER ENG:** You never know.

6 **ATTORNEY TARDIFF:** You don't know.

7 **DEPUTY COMMISSIONER MARTIN:** Well, I don't know
8 where I found it.

9 **ATTORNEY TARDIFF:** Well, check your copy to see if
10 it says *Jimenez* at the bottom.

11 **DEPUTY COMMISSIONER MARTIN:** Well, I'm not able to
12 locate the copy. I am looking at the 2002, yes, but then
13 it skips to 2005. I saw a 2003 -- oh, I'm sorry. Did I
14 say psych eval?

15 **ATTORNEY TARDIFF:** Yes.

16 **PRESIDING COMMISSIONER ENG:** Right.

17 **DEPUTY COMMISSIONER MARTIN:** Folks, I'm sorry. I
18 meant to comment that the 2003 Life Prisoner Evaluation
19 Report --

20 **PRESIDING COMMISSIONER ENG:** Oh, okay.

21 **DEPUTY COMMISSIONER MARTIN:** Speculated that
22 Mr. Jimenez had a moderate degree of threat to the public.
23 The 2004 Life Prisoner Evaluation Report made no such
24 comment. Well, it was these two reports that heightened my
25 awareness to, as I call it, the risk quotient. So in the
26 2005, in the March psych eval, you had been accused of
27 participating in a riot. I think there was a 115 or there

1 was the potential 115 or you were contesting a 115.

2 **INMATE JIMENEZ:** Yes, yes.

3 **DEPUTY COMMISSIONER MARTIN:** That initial report
4 gave you, and I think in the report's words, an elevated
5 risk factor, referring to you as having a risk factor
6 slightly higher than average risk in the community when
7 compared with other released parolees. However, we do have
8 a 2005 update, psych eval update, and there the risk
9 factors are described as no greater than the average
10 citizen in the community. And I believe, sir, that's
11 because, I need your help here, you were cleared of
12 participation in the riot.

13 **INMATE JIMENEZ:** Yes, sir.

14 **DEPUTY COMMISSIONER MARTIN:** Okay. I finally got
15 there. I'm sorry I led everyone astray. But there was a
16 theme of considering your risk of threat or risk of
17 violence, it's been not only been referred to in the Life
18 Prisoner Evaluation Reports but also in the psych eval.
19 Did I leave anything out? Okay. I'm going to return --

20 **ATTORNEY TARDIFF:** Did he get the BRAG?

21 **DEPUTY COMMISSIONER MARTIN:** We talked about the
22 BRAG; we have a chrono from July of '06. I'll return to
23 the Chair.

24 Commissioner, I have to leave the room for just a
25 couple of minutes, please. Can you brief me on the parole
26 plans when I return? Okay.

27 **PRESIDING COMMISSIONER ENG:** Do you want us to take

1 a recess?

2 **DEPUTY COMMISSIONER MARTIN:** No, I'll just be a
3 couple of minutes.

4 **PRESIDING COMMISSIONER ENG:** Okay. Sir, let's talk
5 about your parole plans. I'm going to take a look and see
6 because we've got this new information. You plan to, I
7 don't know, you'll have to tell me if this is updated. The
8 recent board report that we're holding right now, that I'm
9 holding right now, states for the May 2007 calendar, but we
10 know it's April, says that you plan to live with your
11 mother, Leonora, in Long Beach, and that your family will
12 support you financially. And then it states, if you're
13 deported to Mexico you plan to live with your aunt, Delores
14 Garcia, and I guess this is an address in San Martin,
15 what's h-g-o?

16 **INMATE JIMENEZ:** It's Hidalgo.

17 **PRESIDING COMMISSIONER ENG:** H-g-o?

18 **INMATE JIMENEZ:** Yeah, I think that's an
19 abbreviation.

20 **PRESIDING COMMISSIONER ENG:** For Hidalgo? And then
21 j-a-l? Jalisco?

22 **INMATE JIMENEZ:** Yes, ma'am.

23 **PRESIDING COMMISSIONER ENG:** When was the last time
24 you were in Mexico?

25 **INMATE JIMENEZ:** When they brought me, the age of
26 five.

27 **PRESIDING COMMISSIONER ENG:** Five? Never been

1 back, huh? Speak Spanish?

2 **INMATE JIMENEZ:** Yes.

3 **PRESIDING COMMISSIONER ENG:** Okay. That helps.

4 Okay. And regarding employment states that your brother

5 will help you obtain a job in order to support yourself.

6 Okay. I'm assuming that this is a younger brother.

7 **INMATE JIMENEZ:** No.

8 **PRESIDING COMMISSIONER ENG:** Your older brother?

9 **ATTORNEY TARDIFF:** They're all in the United

10 States. In fact, his younger siblings were born in the

11 United States so they're citizens.

12 **PRESIDING COMMISSIONER ENG:** Right, the two younger

13 ones. No, but I was asking if your younger brother is

14 going to help you get a job because I thought your older

15 brother is in prison.

16 **INMATE JIMENEZ:** They're referring to him there.

17 **PRESIDING COMMISSIONER ENG:** They're referring to

18 your brother in prison?

19 **INMATE JIMENEZ:** I don't think he was locked up

20 when that report was made.

21 **PRESIDING COMMISSIONER ENG:** Because this is the

22 most recent one. Is your brother in prison right now?

23 **INMATE JIMENEZ:** Yes.

24 **ATTORNEY TARDIFF:** When you talked to your

25 counselor, what did you tell him about a job offer?

26 **INMATE JIMENEZ:** I told him it would be over here

27 in San Jose.

1 **ATTORNEY TARDIFF:** Okay. Well, that's what the
2 board report, the counselor wrote, that your brother would
3 get you a job.

4 **INMATE JIMENEZ:** I think that's a report from a few
5 years back.

6 **PRESIDING COMMISSIONER ENG:** Well, it's the most
7 recent one that we have and sometimes, unless you provide
8 them with updated information, it could be the same as what
9 you provided at prior times.

10 **ATTORNEY TARDIFF:** Did you get a copy of the recent
11 board report, counselor's report?

12 **INMATE JIMENEZ:** Yes.

13 **ATTORNEY TARDIFF:** You read it?

14 **INMATE JIMENEZ:** Yes, I did and it had that.

15 **PRESIDING COMMISSIONER ENG:** So that's why I was
16 asking which brother they were referring to. I thought it
17 was a younger brother because if your older brother is in
18 prison how is he going to help you find a job, you see? So
19 that really is erroneous; is that correct?

20 **INMATE JIMENEZ:** Yes, ma'am.

21 **PRESIDING COMMISSIONER ENG:** Okay. So let's take a
22 look at some of these letters. I have in the new
23 information we have a letter from Rosa Jimenez, who lives
24 in Garden Grove, and this letter is dated March 21st, 2007,
25 and this is your older sister?

26 **INMATE JIMENEZ:** Yes.

27 **PRESIDING COMMISSIONER ENG:** Okay. And this I

1 believe -- have you seen the letter?

2 **INMATE JIMENEZ:** Yes, ma'am.

3 **PRESIDING COMMISSIONER ENG:** Okay. So is this a
4 general support letter?

5 **INMATE JIMENEZ:** Yes.

6 **PRESIDING COMMISSIONER ENG:** I don't think there is
7 anything very specific about what she's offering you, is
8 there in here? I'm not missing anything?

9 **INMATE JIMENEZ:** No, just support.

10 **PRESIDING COMMISSIONER ENG:** Yes, good. She says
11 she personally has some friends that are willing to offer
12 him a job even though they don't know him. That's still
13 pretty general. Okay, okay. So that's one of the new
14 ones. And then I know we have some in here because I
15 double checked with the ones that you provided. And I do
16 have a few that I've pulled out. Wait a minute, no,
17 they're actually in this packet. We have a lot of new
18 information that came in. Okay. I do have a letter from
19 J. Concrete and Pavers in San Jose from Jose Quintero,
20 Q-U-I-N-T-E-R-O, did I pronounce that correctly?

21 **INMATE JIMENEZ:** Yes, yes. Quintero.

22 **PRESIDING COMMISSIONER ENG:** Okay. And he basically
23 states that he would give you a chance to work for him if a
24 position was open after your release. So what do you --
25 who is Jose Quintero?

26 **INMATE JIMENEZ:** This is my wife's sister's
27 father-in-law.

1 **PRESIDING COMMISSIONER ENG:** Okay, okay. Do you
2 know anything about his business?

3 **INMATE JIMENEZ:** Landscaping.

4 **PRESIDING COMMISSIONER ENG:** Okay. How come it's J
5 Concrete and Pavers?

6 **INMATE JIMENEZ:** I'm not sure, but he's a
7 landscaper.

8 **PRESIDING COMMISSIONER ENG:** But again this letter
9 is dated March 27th, 2007 and that would be for the San Jose
10 area?

11 **INMATE JIMENEZ:** Yes, ma'am.

12 **PRESIDING COMMISSIONER ENG:** Okay. This is your
13 sister, it must be a younger sister.

14 **INMATE JIMENEZ:** She's the youngest.

15 **PRESIDING COMMISSIONER ENG:** She's the baby?

16 **INMATE JIMENEZ:** Yes.

17 **PRESIDING COMMISSIONER ENG:** Okay. There's no
18 address here and I'm trying to remember, you at least in
19 yours provided a copy of the envelope, so she lives in Long
20 Beach.

21 **INMATE JIMENEZ:** Yes.

22 **PRESIDING COMMISSIONER ENG:** She lives in Long Beach
23 and she says that she would help you with any kind of
24 support that you need. *Will help him with housing and*
25 *financial support*, and then the rest is pretty much a
26 general support letter, correct?

27 **INMATE JIMENEZ:** Yes.

1 **PRESIDING COMMISSIONER ENG:** Okay. How old is she?

2 **INMATE JIMENEZ:** I believe she's 31.

3 **PRESIDING COMMISSIONER ENG:** So is she married with
4 kids?

5 **INMATE JIMENEZ:** She's got two kids.

6 **PRESIDING COMMISSIONER ENG:** We have a letter dated
7 March 22nd, 2007. And there were a couple of them and I
8 think that because your -- this is from Carolina Jimenez,
9 your wife?

10 **INMATE JIMENEZ:** Yes.

11 **PRESIDING COMMISSIONER ENG:** And she has sent a
12 correction, I think the one we have in the record is a
13 corrected one but I can't remember what mistake she said
14 that she made.

15 **INMATE JIMENEZ:** She had put just my counselor's
16 name and I thought there would be a problem there and I
17 told her to direct it to you.

18 **PRESIDING COMMISSIONER ENG:** The board members,
19 okay. So it's dated March 22nd and basically she says that
20 the two of you married January 6th, this year.

21 **INMATE JIMENEZ:** Yes, ma'am.

22 **PRESIDING COMMISSIONER ENG:** Okay. Prior to that
23 you hadn't been married?

24 **INMATE JIMENEZ:** No, ma'am.

25 **PRESIDING COMMISSIONER ENG:** No children?

26 **INMATE JIMENEZ:** No, ma'am.

27 **PRESIDING COMMISSIONER ENG:** We should have covered

50

1 that before but okay. And that she's known you for about
2 eight years. She says that the two of you met through her
3 brother-in-law, Jose Herralde [phonetic)?

4 **INMATE JIMENEZ:** Yes.

5 **PRESIDING COMMISSIONER ENG:** And how do you know her
6 brother-in-law; is he in prison?

7 **INMATE JIMENEZ:** He was here.

8 **PRESIDING COMMISSIONER ENG:** Was he in the gangs
9 too?

10 **INMATE JIMENEZ:** No.

11 **PRESIDING COMMISSIONER ENG:** What was he here for?

12 **INMATE JIMENEZ:** It was drug related.

13 **PRESIDING COMMISSIONER ENG:** Drug related? So
14 where's Carolina, she lives in San Jose?

15 **INMATE JIMENEZ:** Yes, ma'am.

16 **PRESIDING COMMISSIONER ENG:** Has she sort of been
17 there most of her life, around San Jose?

18 **INMATE JIMENEZ:** Yes.

19 **PRESIDING COMMISSIONER ENG:** And she says she's
20 aware of your INS hold and that deportation process would
21 occur. And she's written a support letter for you and she
22 states that if there's any way possible if you could live
23 in her home on Ryan Street. Do you know, does she own her
24 own home?

25 **INMATE JIMENEZ:** Yes, yes.

26 **PRESIDING COMMISSIONER ENG:** Or is she renting?

27 **INMATE JIMENEZ:** It's her home.

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1 **PRESIDING COMMISSIONER ENG:** Does she have kids?

2 **INMATE JIMENEZ:** She has one daughter?

3 **PRESIDING COMMISSIONER ENG:** How old is the
4 daughter?

5 **INMATE JIMENEZ:** Ten years old.

6 **PRESIDING COMMISSIONER ENG:** Ten? Okay. So
7 Carolina, had she been married before?

8 **INMATE JIMENEZ:** No, ma'am.

9 **PRESIDING COMMISSIONER ENG:** Okay. So who's the
10 father of her daughter; do you have any idea?

11 **INMATE JIMENEZ:** I don't know him.

12 **PRESIDING COMMISSIONER ENG:** So you don't know if
13 he's dead, alive?

14 **INMATE JIMENEZ:** Oh, I think he's living in Mexico.

15 **PRESIDING COMMISSIONER ENG:** Oh, he is?

16 **INMATE JIMENEZ:** Yes.

17 **PRESIDING COMMISSIONER ENG:** Okay. So would your
18 wife be going to Mexico with you?

19 **INMATE JIMENEZ:** Yes, yes, ma'am.

20 **PRESIDING COMMISSIONER ENG:** When was the last time
21 she was ever in Mexico, living?

22 **INMATE JIMENEZ:** Living? I don't know but she goes
23 over there to travel and right now, I think she's over
24 there right now visiting her brother-in-law.

25 **PRESIDING COMMISSIONER ENG:** So where is her family
26 from down in Mexico?

27 **INMATE JIMENEZ:** No, they're all from here.

1 **PRESIDING COMMISSIONER ENG:** She was born and raised
2 in the U.S.?

3 **INMATE JIMENEZ:** San Jose.

4 **PRESIDING COMMISSIONER ENG:** Okay. So how do you
5 think she's going to adjust to living in Mexico?

6 **INMATE JIMENEZ:** No, we've talked about it and she's
7 willing to start a new life over there.

8 **PRESIDING COMMISSIONER ENG:** Okay. And then we have
9 some additional letters. I've got one from Rosa Linda
10 Herraldez in San Jose.

11 **INMATE JIMENEZ:** Yes.

12 **PRESIDING COMMISSIONER ENG:** Okay. I have to be
13 careful because I think one of these was ripping, this is
14 the one. Dated March 7, 2007 and states that I am Jose's
15 sister-in-law, known him for seven years. Her husband,
16 Jose Herraldez, knows you and introduced my sister, so this
17 is your wife's sister?

18 **INMATE JIMENEZ:** Yes, ma'am.

19 **PRESIDING COMMISSIONER ENG:** She says she can help
20 you with guidance and moral support since she's a teacher.
21 She has a BA degree in Social Sciences and Child
22 Development. Okay. So it's a general support letter,
23 correct?

24 **INMATE JIMENEZ:** Yes.

25 **PRESIDING COMMISSIONER ENG:** And then I do -- I
26 think all these other ones I already read, I believe, okay?
27 Except for this one, this one is from Mexico, from

1 Guadalajara, you pronounce that Jalisco?

2 **INMATE JIMENEZ:** Jalisco.

3 **PRESIDING COMMISSIONER ENG:** I'm trying not to
4 mispronounce. I don't know if you've -- I have horrible
5 pronunciation. And this is from Jorge Garcia Rodriguez, so
6 who is this?

7 **INMATE JIMENEZ:** My uncle.

8 **PRESIDING COMMISSIONER ENG:** He's your uncle, okay.
9 So has he always lived down in Guadalajara?

10 **INMATE JIMENEZ:** Yes.

11 **PRESIDING COMMISSIONER ENG:** All right. So he
12 states that you can count on his support since -- *all my*
13 *support since he'll have a home, food and above all I work*
14 *in the business of -- I don't know what -- Delacatos*
15 *Occidenti {phonetic}, whatever that is, that devises dull,*
16 *caustic and melts the stone of silicato, where we will be*
17 *able to be performed and to show this one to be returned --*
18 I don't understand any of that. Why don't you explain, it
19 must have gotten lost in the translation. So why don't you
20 try to explain what your uncle is trying to tell us.

21 **INMATE JIMENEZ:** I was explaining to Ms. Tardiff
22 that I think the translator over there did not know how to
23 speak English.

24 **PRESIDING COMMISSIONER ENG:** So do you have any idea
25 what your uncle was trying to tell us?

26 **INMATE JIMENEZ:** Basically that he works in a
27 factory and that he's willing to help me work there and

1 that's the opportunity he's giving me and a place to live.

2 **PRESIDING COMMISSIONER ENG:** What do you know about
3 this uncle? By the way this --

4 **INMATE JIMENEZ:** (Overlapping) He's my mom's
5 brother.

6 **PRESIDING COMMISSIONER ENG:** It's your mother's
7 brother, okay. And this letter is dated February 28th,
8 2007. And again it's down in Guadalajara. Your family
9 wasn't from Guadalajara, were they?

10 **INMATE JIMENEZ:** Yes.

11 **PRESIDING COMMISSIONER ENG:** They were?

12 **INMATE JIMENEZ:** Yes.

13 **PRESIDING COMMISSIONER ENG:** And you've never been
14 back to Guadalajara? Okay. Do you know about where your
15 uncle lives? Does he have a large family?

16 **INMATE JIMENEZ:** No, I think it's just him and his
17 wife. All his kids are grown.

18 **PRESIDING COMMISSIONER ENG:** Does he have an
19 apartment or does he have a house?

20 **INMATE JIMENEZ:** It's a house.

21 **PRESIDING COMMISSIONER ENG:** Is it in the city or is
22 it in the countryside? You don't know yet, huh?

23 **INMATE JIMENEZ:** I don't know yet.

24 **PRESIDING COMMISSIONER ENG:** Okay. Is there
25 anything else, did I miss any?

26 **INMATE JIMENEZ:** No.

27 **PRESIDING COMMISSIONER ENG:** Okay. You didn't miss

1 that much out there. Okay. All right. So we send out
2 3042 Notices and those notices do go to agencies that have
3 a direct interest in your case. I don't recall seeing any
4 letters, better double check though. However, as I'm
5 checking I will state for the record that we do have
6 present with us a representative from the District
7 Attorney's Office of Los Angeles County and I'm sure he
8 will be making a statement regarding parole suitability
9 prior to our recess for deliberations. So we are not in
10 receipt of a letter. So at this point in time what we
11 generally do, sir, is open it up to follow-up questions and
12 first of all we'll do that with the panel. I can't help
13 but notice, are you feeling okay?

14 **INMATE JIMENEZ:** I'm very nervous.

15 **PRESIDING COMMISSIONER ENG:** Okay. But I noticed it
16 right away and then I thought, oh, my goodness, I didn't
17 know if it was just a profound sadness or you're hiding
18 behind -- what's going on -- or if you were ill. Okay.
19 but you're okay?

20 **INMATE JIMENEZ:** Yes, ma'am.

21 **PRESIDING COMMISSIONER ENG:** Okay. So any follow up
22 questions. Right now I don't have any. Oh, sir, were you
23 going to AA for a while?

24 **INMATE JIMENEZ:** Yes.

25 **PRESIDING COMMISSIONER ENG:** How long did you go to
26 AA?

27 **DEPUTY COMMISSIONER MARTIN:** I mentioned chronos

1 back in 2004 and he was a consistent attendee all through
2 2006, there were four chronos for each of the four quarters
3 of last year.

4 **PRESIDING COMMISSIONER ENG:** And I may have missed
5 this and I'm sorry if I did but what did you get out of it?

6 **INMATE JIMENEZ:** It taught me to understand a little
7 about addiction and if you do, if you work on it, if you
8 work those steps, I'm pretty sure it can help an
9 individual.

10 **PRESIDING COMMISSIONER ENG:** Anything else? Did you
11 think that it related to anything specific to you?

12 **INMATE JIMENEZ:** No, because I didn't get the chance
13 to become an alcoholic but it's helpful because you hear
14 the stories, positive things come out of it, you know, and
15 if I did feel that I was an alcoholic it would help, you
16 know. But basically my self-help has been attending
17 church, you know, that's been my self-help really.

18 **PRESIDING COMMISSIONER ENG:** Let me ask you
19 something, were you raised Catholic?

20 **INMATE JIMENEZ:** Yes.

21 **PRESIDING COMMISSIONER ENG:** And even when you were
22 younger, when your family came to the United States, did
23 you and your family go to church regularly?

24 **INMATE JIMENEZ:** Yes, yes.

25 **PRESIDING COMMISSIONER ENG:** Were you going
26 regularly even through your teen years?

27 **INMATE JIMENEZ:** No, not regularly.

1 **PRESIDING COMMISSIONER ENG:** So how do you feel
2 about what you did, about your prior criminal history,
3 relative to your beliefs as a Catholic? How do you come to
4 grips with that?

5 **INMATE JIMENEZ:** I accept it, you know, my
6 responsibility, my actions, my behavior. I do feel, you
7 know, very, very said for my family, especially for his
8 family, also because his family are probably in the same
9 predicament as I was, as my family was. I understand, you
10 know, how they must be going through, you know, the
11 suffering and the pain and I just hope that they can
12 forgive for what I did.

13 **PRESIDING COMMISSIONER ENG:** Okay. Do you have any
14 questions you would like to ask?

15 **DEPUTY COMMISSIONER MARTIN:** Just one. What's your
16 stepdaughter's name?

17 **INMATE JIMENEZ:** Armida.

18 **DEPUTY COMMISSIONER MARTIN:** Rita?

19 **INMATE JIMENEZ:** Armida.

20 **DEPUTY COMMISSIONER MARTIN:** Say again?

21 **INMATE JIMENEZ:** Armida.

22 **DEPUTY COMMISSIONER MARTIN:** Armita, A-R-M-I-T-A?

23 **INMATE JIMENEZ:** No, d-a.

24 **DEPUTY COMMISSIONER MARTIN:** D-A, A-R-M-I-D-A. How
25 good is her Spanish?

26 **INMATE JIMENEZ:** Not good.

27 **DEPUTY COMMISSIONER MARTIN:** Are you going to take

1 her to Mexico with you and Carolina?

2 **INMATE JIMENEZ:** Yes. At the moment, she is
3 teaching her how to speak because her father doesn't speak
4 English. She's been wanting to teach her so she's doing
5 that right now.

6 **DEPUTY COMMISSIONER MARTIN:** No other questions.

7 **PRESIDING COMMISSIONER ENG:** Mr. Eastman, any
8 questions?

9 **DEPUTY DISTRICT ATTORNEY EASTMAN:** No.

10 **PRESIDING COMMISSIONER ENG:** Okay. Ms. Tardiff, any
11 questions?

12 **ATTORNEY TARDIFF:** No.

13 **PRESIDING COMMISSIONER ENG:** Let's move into final
14 statements. Mr. Eastman?

15 **DEPUTY DISTRICT ATTORNEY EASTMAN:** Thank you. The
16 district attorney objects to a finding of suitability for
17 the inmate. It is our opinion that for a large variety of
18 reasons the inmate is unsuitable in virtually all of the
19 categories although there are good things to be said about
20 conduct in the institution. But of course the life crime
21 and the lifestyle of the inmate as a juvenile, and he used
22 the word gangbanger, is absolutely inexcusable. I remember
23 a friend being quoted one time about rehabilitation, saying
24 that some of the people had never been habilitated. That's
25 kind of crude but it's not a bad analogy to what the inmate
26 said today about himself at the time when he was 16, 17, 18
27 years of age. His conduct in the institution in the early

1 years continued with the same attitude. The motive for the
2 crime and this is what is terrible about this crime and
3 terrible about so many gang homicides is there just
4 virtually is no motive, it was very trivial. The victim
5 was left alone by his fellow gang members and was just
6 pounced upon and beaten to death and this inmate
7 participated and apparently had fun doing so. It is a
8 crime for which an enormous amount of remorse and insight
9 has to be developed and inmate in our opinion has not
10 developed the kinds of insight that are needed to satisfy
11 we suggest a panel that he really has come to grips with
12 the enormity of this crime and understands what he did. I
13 will leave it to the panel, there were good questions as to
14 many of the weaknesses in the inmate's programming in the
15 institution, even in recent years when the number of
16 disciplinaries has fallen off. The self-help is not what
17 it should be, the activities and the in the last area, the
18 area of parole plans. Going to a foreign country, going to
19 a poor country one has not lived in since they were a small
20 child requires almost by definition much more precision in
21 terms of the parole plans than would be required if the
22 person were going to parole to some place that he was more
23 familiar with. And his parole plans in our opinion lack
24 the kind of precision that is needed. So we ask for a
25 denial. Thank you very much.

26 **PRESIDING COMMISSIONER ENG:** Ms. Tardiff?

27 **ATTORNEY TARDIFF:** Thank you. Since Mr. Jimenez has

1 been incarcerated he has done quite a few things to fulfill
2 suitability requirements. The district attorney remarked
3 that he was unsuitable in all categories, I think that's a
4 rather exaggerated statement. He did obtain his GED in
5 '94. He's vocationally upgraded, landscaping and printing.
6 Currently he's in vocational computer repair. So he's done
7 a good job in those two areas. He's been in PIA to some
8 extent. His disciplinary history is very good. He's only
9 had one 115 his entire incarceration and that was in '93,
10 it did not involve force or violence, 13 years ago, 14
11 years ago, again a factor of suitability. Self-help, he's
12 done Anger Management, BRAG, Marriage Relationship course,
13 AA all year and from his own testimony participating in
14 church services has been of the greatest benefit to him.
15 So he's done well in that category as well. There's not a
16 whole lot of other categories for him to -- I mean he can
17 keep improving obviously but I think he's done a very good
18 job in every area of programming he needs to be doing. His
19 parole -- I'll go to the psych evals. In '96 the psych
20 eval, the psychologist stated that, he appears to be trying
21 hard to be rehabilitated. That he continues improvement.
22 And his violence potential in the past was less than
23 average -- I mean greater than average and it's now
24 decreasing. In '98 he got a less than average inmate
25 rating and then in '02 slightly higher than the average
26 citizen. Noted that his insight and judgment were intact,
27 he had a high GAF score of 80 and his prognosis for

1 community living was positive. And then in July of '05 he
2 received a very favorable report. His violence potential
3 was the same as the average citizen and it closed, *at this*
4 *time Inmate Jimenez is a suitable candidate for parole*
5 *release consideration.* So I think it's obvious that he's
6 not unsuitable in all categories as was stated before, but
7 in fact he's probably fulfilled the majority of the
8 suitability factors. His parole plans, he has parole plans
9 in both the United States and Mexico. The remark that
10 because he was not familiar with Mexico, being deported
11 back there, because he left there when he was four or five
12 and doesn't really know anything, requires more precision,
13 I'm not sure exactly what that means. But unfortunately
14 until he goes there I don't know how much more precise they
15 can be. He has a job and housing in Mexico with his uncle,
16 I think that's sufficient parole plans. They'll also be
17 checked out by Sacramento should he receive a date. And
18 then lastly the amount of time that he's served since he's
19 been incarcerated. He's been-- he actually has grown up in
20 prison, he was 17 when he came in. Obviously he's not a
21 17-year old teenager today, he's a grown man. He had to
22 learn a lot while he was in here. I think any risk of
23 dangerousness would be gang affiliation and he does not
24 have any indication in his record that he currently is
25 involved in the gangs in prison which I'm sure we're all
26 aware is quite prevalent, so I don't believe that there are
27 any risk factors. Being deported to Mexico pretty much

1 will do away with California gangs or the area that he had
2 gang involvement and I don't think his criminality was
3 associated with anything but gang involvement. So I would
4 submit at this time he does not pose a risk to society.
5 Thank you.

6 **PRESIDING COMMISSIONER ENG:** Okay. Thank you.

7 Mr. Jimenez, you have an opportunity if you want to
8 to make a final statement regarding your parole
9 suitability.

10 **INMATE JIMENEZ:** Well, first of all I'd just like to
11 apologize for my nervousness. I just want to say I'm
12 sorry, you know, I extend this sorriness [sic] for my
13 victim's family most importantly and I just leave it in
14 your hands. Thank you.

15 **PRESIDING COMMISSIONER ENG:** Okay. Thank you. The
16 time is 1:26.

17 **R E C E S S**

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1 CALIFORNIA BOARD OF PAROLE HEARINGS

2 D E C I S I O N

3 DEPUTY COMMISSIONER MARTIN: We're back on tape.

4 PRESIDING COMMISSIONER ENG: Oh, okay. We're still
5 missing someone -- but okay. The time is 1:45. All
6 parties that were present prior to our recess for
7 deliberations have since returned.

8 In the matter of Jose Jimenez, CDC number E-49850
9 the panel has reviewed all the information received from
10 the public and relied on the following circumstances in
11 concluding that the victim [sic] is not suitable for parole
12 and would pose an unreasonable risk of danger to society or
13 a threat to public safety if released from prison.

14 One of the major factors, sir, is that commitment
15 offense was so brutal. It was carried out in such a cruel,
16 and callous manner. Multiple victims and perpetrators were
17 involved in this same incident because we had four
18 different gangs involved initially in this altercation.
19 And it was very unfortunate that this one person, Jose
20 Gonzalez, who happened to be a member of the Eastside Longo
21 gang ended up somehow being left behind and ended up losing
22 his life. This particular victim, Mr. Gonzalez, was
23 brutally beaten by members of the three gangs, the T-Town
24 Flats, Barrio and La Loma and of course Mr. Jimenez was one
25 of the major perpetrators, being armed with a, I believe it
26 was a piece of wood with a nail sticking out of it.

1 Everyone continued to beat this poor man. He ended up
2 being, talk about being abused, he was somewhat defiled and
3 somewhat mutilated if you take a look at the coroner's
4 report and what he suffered during this offense. It was
5 carried out in a manner that demonstrates an absolute
6 callous disregard for human suffering. This man didn't
7 stand a chance. He was not armed, he was ganged up and
8 being beaten to death by a bunch of people holding 2x4s,
9 bats or what have you, but he absolutely didn't stand a
10 chance and then was left there basically to die. And the
11 motive for the crime appears to us to be basic gang
12 rivalry. These conclusions are drawn from the Statement of
13 Facts where on that evening of October 31st, 1985,
14 Mr. Jimenez and all his co-defendants beat Mr. Gonzalez to
15 death and according to witnesses one of the crime partners
16 Lucero initially chased the victim and knocked him to the
17 ground. Then Mr. Jimenez and other crime partners using a
18 shovel, 2x4 with a nail and a crowbar proceeded to
19 administer a brutal beating upon the unarmed defenseless
20 victim who lay on the ground. Even to the point where
21 there were two females who were witnesses tried to
22 intervene. However, basically they were chased away and
23 basically threatened themselves. So Lucero, defendant
24 Lucero returned to the victim and proceeded to strike him
25 with a 2x4, knocking out several teeth.

26 Regarding this inmate's prior record he started at a

1 relatively young age. He does have a record of violence
2 and actual assaultive behavior. His first contact with law
3 enforcement goes back to 1983 when he was only 14 years of
4 age and he was arrested for assault with a deadly weapon,
5 specifically a screwdriver, where his older brother had
6 shot this victim and according to the records he ended up
7 stabbing him with a screwdriver. He does have an
8 escalating pattern of criminal conduct that led up to this
9 life crime. Again subsequent to the 1983 incident for
10 assault with a deadly weapon he was found to be in
11 violation of probation a year later at 16, in the summer of
12 1984, and he was sentenced to more time. Apparently he was
13 with a girlfriend who had a PCP cigarette and he was
14 holding it for her. Then about six months later in 1985
15 when he was 17 he was again picked up for a violation of
16 probation and it was really a failure to report to his
17 probation officer, which led to the issuance of another
18 bench warrant. So from a very early age this inmate showed
19 that he really had a total disregard for the laws of
20 society and was really driven by the laws of the gang.
21 Again he has failed previous grants of probation,
22 specifically because he was a juvenile during all these
23 times because he was 17 when he committed the life crime,
24 he has failed attempts such as juvenile probation and
25 juvenile camp. He does have history of tumultuous
26 relationships with others and this is evidenced by his

1 heavy gang involvement since the age of 15. And had a
2 relatively unstable social history. He was one of seven
3 siblings, the two youngest ones were born in the U.S. but
4 he was one of 5 that his parents brought to the United
5 states from Mexico when he was only 5 years of age. But
6 his older brother was a gang member and in our discussions
7 this inmate stated how he did look up to his brother and
8 ended up following in his footsteps right into the gang
9 activity, which again led him to this life offense.

10 Regarding his institutional behavior, the misconduct
11 while incarcerated does include six 128A counseling
12 chronos, the last one being in September of '95 for being
13 absent from his assignment and only one more serious 115
14 disciplinary back in August of 93 for failure to get into a
15 prone position during an alarm. This panel finds that this
16 inmate does not have any realistic parole plans and we
17 understand that it is going to be very difficult in that we
18 don't see him as having any viable residential plans in his
19 last country of legal residence. He will be deported to
20 Mexico and he does not have any acceptable employment
21 plans. However, he does have some marketable skills, but
22 he does need time to figure out how to better develop his
23 parole plans back in Mexico being that he hasn't been in
24 that country since he was the age of five. Regarding 3042
25 notices, the panel does note that the representative from
26 the District Attorney's Office of Los Angeles County was

1 present today and did state their opposition to parole.

2 The panel makes the following findings, that this
3 prisoner does need more documented self-help in order to
4 face, discuss, understand and cope with stress and anger in
5 a non-destructive manner. Until progress is made this
6 prisoner continues to be unpredictable and a threat to
7 others. However, this panel does believe that Mr. Jimenez
8 should be commended for number one, being able to obtain
9 his GED while he was incarcerated. He was also able to
10 obtain two vocations and is working, I believe, in a third
11 one, and that his recent completion of 12, I believe it was
12 Anger Management sessions within the BRAG program just
13 recently in 2006. However, we find that these positive
14 aspects of his behavior do not outweigh the factors of
15 unsuitability.

16 Sir, this is a two-year denial. In a separate
17 decision the hearing panel finds that it is not reasonable
18 to expect that a parole would be granted at a hearing
19 during the following two years. Specific reasons for this
20 finding are as follows. Again, the prisoner committed the
21 offense in a very cruel, very cold and callous manner.
22 Specifically he participated in beating to death this
23 unarmed gang rival, basically participated in beating him
24 to death and then just leaving him there without any regard
25 for this man's life. And basically the only thing that he
26 and his - all the other gang members thought of was

1 possible retaliation by the rival gang. But really total
2 disregard for the laws of the land here. Multiple victims
3 at first and multiple perpetrators were involved in this
4 incident. Again there were three carloads of the Eastside
5 Longo gang members and then we had T-Town Flats gang, we
6 had the La Loma gang members and the Barrio gang members
7 and the key people that were the crime partners to this
8 inmate happened to be representatives from the other gangs.
9 The victim was in fact abused, defiled and somewhat
10 mutilated during the offense. Specifically it states, I
11 may have lost it now, darn it, oh I lost it. But basically
12 this victim suffered lacerations, punctures to the face,
13 chest, head along with many of his teeth missing and I
14 believe my fellow commissioner stated somewhere that he
15 read that it was really hard to even identify the victim.
16 It was carried out in a manner that demonstrates a total
17 disregard for human suffering let alone human life, and
18 again the motive for the crime was really based on gang
19 rivalry, extremely trivial in relation to the results of
20 this offense, and somebody losing his life in the way that
21 he did. This prisoner has a prior record of violent and
22 somewhat aggressive behavior in that at the young age of 14
23 he was already involved in an assault with a deadly weapon
24 and basically had to go to juvenile camp. Again he does
25 have a history of criminality and misconduct because at the
26 age of 14, pretty much every year leading up to the age of

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1 17 when he was arrested for the life crime, he has had
2 contact with law enforcement and problems with violating
3 his probation. He does have that unstable history and
4 tumultuous relationships with others and this is indicative
5 of the fact that this inmate chose to become affiliated
6 with a gang since the age of 15, following in his brother's
7 footsteps. Therefore, this panel really believes that this
8 inmate does need a longer period of observation and
9 evaluation before the board should find that he is suitable
10 for parole. This panel recommends that the inmate remain
11 disciplinary free, the more distance you get from all these
12 disciplinaries the better off you are. That if available,
13 you continue to upgrade yourself vocationally and
14 educationally and also that you participate in any and all
15 type of self-help. We felt, sir, that we know it's going
16 to be difficult for you to pull together those parole plans
17 and we felt that it would not be fair to give you 12 months
18 to do that in that you do need that additional time because
19 you have not been back in that country since you were a
20 young child and --

21 **A D J O U R N M E N T**

22 --oOo--

23 **PAROLE DENIED FOR TWO YEARS**

AUG 10 2007

24 **THIS DECISION WILL BE FINAL ON: _____**

25 **YOU WILL BE PROMPTLY NOTIFIED IF, PRIOR TO THAT**

26 **DATE, THE DECISION IS MODIFIED**

27 **JOSE JIMENEZ**

E-49850

DECISION PAGE 7

4/11/07

**CERTIFICATE AND
DECLARATION OF TRANSCRIBER**

I, JILL PEARSON, a duly designated transcriber, NORTHERN CALIFORNIA COURT REPORTERS, do hereby declare and certify under penalty of perjury that I have transcribed tape(s) which total one in number and cover a total of pages numbered 1 through 69, and which recording was duly recorded at CORRECTIONAL TRAINING FACILITY, SOLEDAD, CALIFORNIA, in the matter of the SUBSEQUENT PAROLE CONSIDERATION HEARING of JOSE JIMENEZ, CDC No. E-49850, on APRIL 11, 2007, and that the foregoing pages constitute a true, complete, and accurate transcription of the aforementioned tape(s) to the best of my ability.

I hereby certify that I am a disinterested party in the above-captioned matter and have no interest in the outcome of the hearing.

Dated JUNE 17, 2007 at Sacramento County, California.

Jill Pearson

Jill Pearson, Transcriber
Northern California Court Reporters

EXHIBIT "B"

C-FILE

**PSYCHOLOGICAL EVALUATION FOR THE BOARD OF PRISON TERMS
(REVISED AUGUST 1998)
PAROLE CONSIDERATION HEARING
AUGUST 2005 LIFER CALENDAR**

**CORRECTIONAL TRAINING FACILITY, SOLEDAD
JULY 26, 2005**

This is an update to a psychological evaluation for the Board of Prison Terms on inmate Jose Jimenez, CDC# E-49850, conducted by the writer on 02/11/05. In that report, the writer concluded that, due to a recent CDC-115 received by the inmate on 11/20/04 for participating in a riot, community risk factors for inmate Jimenez would be slightly higher than the average citizen.

Since the preparation of the 02/11/05 report, inmate Jimenez has been completely exonerated, and the 115 withdrawn. Consequently, his risk factors are now significantly reduced, to no greater than the average citizen in the community. At this time, inmate Jimenez is a suitable candidate for parole release consideration.



**E. W. Hewchuk, Ph.D.
Staff Psychologist
Correctional Training Facility, Soledad**



**B. Zika, Ph.D.
Senior Supervising Psychologist
Correctional Training Facility, Soledad**

EWH/gmj

**D: 07/26/05
T: 07/27/05**

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PSYCHOLOGICAL EVALUATION FOR THE BOARD OF PRISON TERMS
(REVISED AUGUST 1998)
PAROLE CONSIDERATION HEARING
OCTOBER 2002 LIFER CALENDAR

CORRECTIONAL TRAINING FACILITY, SOLEDAD
JULY 5, 2002

This is the fifth psychological evaluation for the Board of Prison Terms on inmate Jose Jimenez, CDC# E-49850. This report is the product of a personal interview, conducted on 07/05/02, as well as a review of his Central file and unit health record. This single contact interview is for the express purpose of preparing this report.

The inmate was informed of the nature and the purpose of the interview, and the lack of confidentiality inherent in the present assessment. He was also informed that a report for the Board of Prison Terms would be prepared. He understood this and agreed to participate.

PSYCHOSOCIAL ASSESSMENT

I. IDENTIFYING INFORMATION:

Inmate Jimenez is a 33-year-old, single, Hispanic male. His stated religious affiliation is Protestant (he was born Catholic, but is currently an active participant in chapel services). No unusual physical characteristics were noted. He continues to go by his old gang nickname, "Speedy," which he said he has been unable to shake off.

II. DEVELOPMENTAL HISTORY:

Inmate Jimenez was the third of seven children, having an older brother and sister, and four younger sisters. He was raised by both parents.

He stated there were no prenatal or perinatal concerns or birth defects. He had no abnormalities of developmental milestones. All speech, language and motor development occurred unremarkably. He denied any history of cruelty to animals, enuresis or acts of arson. He stated he had no significant childhood

JIMENEZ, JOSE
CDC NUMBER: E-49850
BPT PSYCHOLOGICAL EVALUATION
PAGE TWO

medical history, and denied a childhood history of physical or sexual abuse as either a perpetrator or a victim.

III. EDUCATIONAL HISTORY:

Inmate Jimenez completed the tenth grade and dropped out of high school in the 11th grade. He subsequently completed a GED while incarcerated at the California State Prison, Los Angeles County (LAC) in 1994.

IV. FAMILY HISTORY:

Inmate Jimenez was born in Mexico. At the age of five, he came to California with his family. He has regular contact with both parents, and with his brother and sisters.

V. PSYCHOSEXUAL DEVELOPMENT AND SEXUAL ORIENTATION:

Inmate Jimenez is a heterosexual male. He denied any history of high-risk sexual behavior or sexual aggression, either prior to or since incarceration.

VI. MARITAL HISTORY:

Inmate Jimenez has never been married and has no children.

VII. MILITARY HISTORY:

Inmate Jimenez denied any history of military service.

VIII. EMPLOYMENT/INCOME HISTORY:

Since inmate Jimenez was arrested for the present offense at age 17, he had little opportunity for employment. He never had any paid employment, but helped his brother-in-law with his job as a parking lot sweeper.

Since his incarceration, inmate Jimenez has completed vocational landscaping, participated in a welding program (until it was stopped at the institution where he was incarcerated). He has had numerous jobs, such

JIMENEZ, JOSE
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as maintenance/mechanic work, kitchen work, PIA industries, and his present work in the vocational print shop.

IX. SUBSTANCE ABUSE HISTORY:

Inmate Jimenez said he used "whatever was around." According to his Central file, he has admitted in the past to using alcohol, marijuana and PCP. He states he has had some attendance at Alcoholics Anonymous.

X. PSYCHIATRIC AND MEDICAL HISTORY:

Inmate Jimenez has no prior diagnoses or serious illnesses. He denied any history of medical or psychiatric hospitalizations. He denied any history of serious accidents or head injuries, a history of suicidal behavior, a history of seizures or other neurological conditions, or any significant impairments or disabilities. He is on no medications at this time.

XI. PLANS IF GRANTED RELEASE:

Should inmate Jimenez be given a parole date, he states, "I would live with my parents (in Los Angeles), work with my brother, and do landscaping or construction."

CLINICAL ASSESSMENT

XII. CURRENT MENTAL STATUS/TREATMENT NEEDS:

Inmate Jimenez appears to be his stated age of 33. He was appropriately dressed and groomed. He was coherent, cooperative, calm and alert throughout the interview. His speech was clear and readily understandable. His flow of thought and affect were within the normal range. There were no hallucinations nor delusions noted. He was fully oriented. His intellectual functioning was estimated to be within the average range. His attention and concentration were adequate for the purposes of this examination. There

JIMENEZ, JOSE
CDC NUMBER: E-49850
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was no evidence of a mood or thought disorder. His insight and judgment appeared to be intact. He showed fair insight into his commitment offense.

CURRENT DIAGNOSTIC IMPRESSIONS:

AXIS I: Polysubstance Abuse, in institutional remission.
AXIS II: No Contributory Personality Disorder.
AXIS III: No Contributory Physical Disorder.
AXIS IV: Incarceration.
AXIS V: GAF = 80.

Should this inmate at this time be given a parole or release date, his prognosis for maintaining his present gains in the community is positive.

XIII. REVIEW OF LIFE CRIME:

Inmate Jimenez described the circumstances surrounding his commitment offense.

He stated that he felt angry towards the enemy gang, the East Side Longos, because they had jumped him a few times, from which he received "a few bumps and bruises." Asked how the victim wound up on the ground, he said, "When I got there, he was already on the ground." He admitted hitting the victim with a 4" x 4" board. This was a board that had a rusty nail sticking out at one end, and he was accused of striking the victim with the nail, something he denies, stating, "I was holding the nail end in my hand."

However, this contradicts the account in the Central file, in which a witness said the three gang members attacked an enemy gang member who got left behind after his fellow gang members had left the scene, how the victim was knocked down to the ground by one man using a shovel, how the three continued to beat the victim together. Also, the police report described many lacerations and puncture wounds.

Asked about his feelings about the incident, he said, "It's hard to explain. It was something that shouldn't have happened. If I was a little bit mature, I

JIMENEZ, JOSE
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wouldn't have done the same choices." As to his mistakes that day, he said, "Being involved, and participating in the incident."

XIV. ASSESSMENT OF DANGEROUSNESS:

- A. This inmate has not received any CDC-115 violations during his entire incarceration with one exception. In 08/93, a failure to "prone out" during an alarm. He received a serious CDC-128A in 08/92 for aggressive and disrespectful behavior. Therefore, since he has had no violent behavior during his incarceration of 17 years, it is felt that he would pose a less than average risk for violence when compared to this Level II inmate population.
- B. If released to the community, his violence potential is estimated to be no more than slightly higher than the average citizen in the community. This assessment is in consideration of the following factors:
 - 1) Although this was certainly a very brutal attack on a defenseless victim by a group of gang members, the inmate was 17 years old at the time and very immature, and strongly identified as a gang member.
 - 2) His arrest record shows only two prior incidents of violence (assault with a deadly weapon, and for stabbing someone with a screw driver when he was 14 years old).
 - 3) Inmate Jimenez said he stopped identifying as a gang member after he had been in prison a number of years, up to the point when he was in his early 20s.
 - 4) Inmate Jimenez has been attending church regularly since at least 1996.

XV. CLINICIAN OBSERVATIONS/COMMENTS/RECOMMENDATIONS:

- A. This inmate is competent and responsible for his behavior. He has the capacity to abide by

JIMENEZ, JOSE
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PAGE SIX

institutional standards and has generally done so during his incarceration period.

- B. This inmate does not have a mental health disorder which would necessitate treatment, either during his incarceration period or following parole.
- C. Since inmate Jimenez denies having any alcohol or drug abuse problem, no recommendations are made in this area.

William Gamard, Ph.D.

WILLIAM GAMARD, Ph.D.
Staff Psychologist
CORRECTIONAL TRAINING FACILITY, SOLEDAD

B. ZIKA, Ph.D.

B. ZIKA, Ph.D.
Senior Supervising Psychologist
CORRECTIONAL TRAINING FACILITY, SOLEDAD

WG/gmj

D: 07/05/02
T: 07/09/02

PSYCHOLOGICAL EVALUATION FOR THE BOARD OF PRISON TERMS
PAROLE CONSIDERATION HEARING
OCTOBER 1998

CORRECTIONAL TRAINING FACILITY
JULY 1, 1998

This is a psychological evaluation for the Board of Prison Terms on inmate Jimenez. This report is the product of a personal interview, conducted on 7/1/98, as well as a review of his unit health record. His C-File was not reviewed as it has been unavailable. This interview was a single contact with this inmate for the sole purpose of preparing this report.

Inmate Jimenez was convicted of a gang related murder. Asked for his thoughts and feelings regarding this crime, he stated at that time he was "immature and dumb". He stated that this incident continues to bother him. He took responsibility for this commitment offense.

The inmate stated his most recent CDC-115 violation was in 1994.

He has attended Alcoholics Anonymous in the past, but he does not currently do so. Educationally, he completed his G.E.D. Vocationally, he has experience as a welder and in textiles. If paroled, his plans include becoming a "normal citizen" and working either in welding or with his brother in the landscaping field.

MENTAL STATUS EXAMINATION: Inmate Jimenez is a 29 year-old well Hispanic male, of average build, who appeared slightly older than his stated age. He was appropriately dressed and groomed. He was alert, cooperative and calm. His speech, affect, and flow of thought were all within the normal range. His intellectual functioning was estimated to be within the average range. He demonstrated some insight and understanding into his commitment offense. His judgment appears to be sound. There was no evidence of a mood or thought disorder.

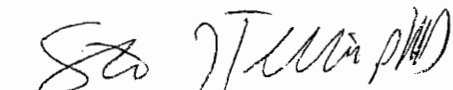
DIAGNOSTIC IMPRESSIONS:

AXIS I: Conduct disorder, group type; by history.
Alcohol abuse, in remission.
AXIS II: No contributory personality disorder.
AXIS III: No contributory physical disorder.

JIMENEZ, JOSE
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PAGE TWO

CONCLUSIONS AND RECOMMENDATIONS:

- 1) This man is competent and responsible for his behavior. He has the capacity to abide by institutional standards.
- 2) Regarding violence potential, in consideration of a number of factors, including his criminal history, as well as his history of CDC-115's, in the past his violence potential outside of a controlled setting, was considered to be average. Currently, it is considered to have decreased. His violence potential relative to this inmate population is below average.
- 3) As he has a history of alcohol abuse, abstinence, monitoring and attendance at Alcoholics Anonymous should be mandatory conditions of parole.
- 4) This man does not have a mental health disorder, which would necessitate treatment either during his incarceration period or following parole.



STEVEN J. TERRINI, Ph.D.
Staff Psychologist
Correctional Training Facility, Soledad

SJT:cjw

D: 7/1/98
T: 7/3/98

RICHARD J. DONOVAN CORRECTIONAL FACILITY

HEALTH CARE SERVICES

PSYCHIATRIC EVALUATION FOR THE BOARD OF PRISON TERMS

October 1996 Calendar

This is the third report to the Board of Prison Terms on this inmate.

This writer has had a thirty minute interview with this inmate and has reviewed his C-File and Medical Record.

CURRENT DEVELOPMENTS AND PROGRESS:

Mr. Jimenez obtained his GED in 1994 at Lancaster State Prison. Presently he is involved with church programs including KAIROS which teaches spiritual feelings and thoughts. This is held in Chapel II and he attends once a month for three months. He has also participated in the Hands of Peace Program to learn to solve problems without violence. This was a three day seminar and he received a certificate. He is currently working in welding and plans to get a certificate in this. He is doing well and is getting good evaluations. He has been doing this for two years at Richard J. Donovan and also at Lancaster.

The instant offense was the murder of Jose Gonzalez. This was a gang action and both the victim and the defendants were gang members. The defendant using a shovel and a 2x4 and a crow bar, according to the C-File gave the victim a brutal beating while he was lying unarmed and defenseless on the ground. The victim had many lacerations and punctures and had many teeth knocked out. He was admitted to the hospital in serious condition and died shortly afterwards. The inmate and two co-defendants were involved in this senseless beating and killing of the victim who at the time of the attack posed no threat to them. When asked about remorse the inmate states that he feels sorry and that "at that time I wasn't thinking. I was thinking criminally." When asked what he would do in the same situation today he replied "I would walk away". He states "I feel I am a different person".

MENTAL STATUS EXAMINATION:

On mental status examination he does not have any evidence of an affective or a thought disorder. His mental status examination is essentially normal.

D: 7-25-96

T: 7-29-96

JIMENEZ, JOSE E-49850 F2-7-115L RJDCF/SD (dg)

BPT CONTINUED
PAGE 2

PSYCHIATRIC DIAGNOSIS:

Axis I: No diagnosis.

Axis II: Antisocial Personality Disorder, improved.

This inmate comes from a poor immigrant family having been born in Mexico and immigrating to California in 1973 with his family. He is fairly contrite and anxious to say the right things and make a good impression. He appears to be trying hard to be rehabilitated so that he can return to the community.

PSYCHIATRIC CONCLUSIONS:

GENERAL CONCLUSIONS:

The diagnosed psychopathology has been related to criminal behavior indirectly. During observation in the institution he has psychiatrically improved moderately. In a less controlled setting, such as return to the community, this inmate is considered likely to continue improvement. From a psychiatric standpoint, this inmate is benefitting from his present rehabilitation program. Violence potential outside a controlled setting in the past is considered to have been greater than average and at present is estimated to be decreased.

PAROLE AND RELEASE:

Conditions of parole should include routine monitoring of drug and alcohol intake. This inmate is not on any drug therapy. I have no further recommendations to the classification committee.



SHELDON J. FALKENSTEIN, M.D.
Staff Psychiatrist

D: 7-25-96

T: 7-29-96

JIMENEZ, JOSE E-49850 F2-7-115L RJDCF/SD (dg)

EXHIBIT "C"

Sent to Inmate on 3/6/07

**KLIFE PRISONER EVALUATION REPORT
SUBSEQUENT PAROLE CONSIDERATION HEARING
MAY 2007 CALENDAR**

JIMENEZ, JOSE

E49850

I. COMMITMENT FACTORS:

- A. **Life Crime:** Murder 2nd degree, PC 187(a), Weapons: Shovel, two-by-four with a nail, and a crowbar. Los Angeles County Case #A032130. Victim: Jose Gonzales, age unknown. Date received by CDCR: 3/27/90. Sentence: 15 years to Life. MEPD: 4/19/97.

1. **Summary of Crime:** On 10/31/85, three car loads of East Side Longos gang members including victim Jose Gonzales, advanced on the territory and confronted rival gang members, including Jimenez (T-Town Flats gang), in retaliation for earlier wrongs perpetrated against them. A gang fight started. After approximately ten minutes, the fight broke up and the East Side Longo gang members left the area leaving the victim behind. According to witnesses, co-defendant Lucero chased Gonzales and knocked him to the ground. Then Jimenez and co-defendants Lucero (La Loma Gang) and Martinez (Barrio Pobre gang), beat the unarmed and defenseless Gonzales using a shovel, a two-by-four with a nail and a crow bar. Two female witnesses's intervened, and after threatening these witnesses, Jimenez left the scene. Lucero (co-defendant), however returned to the victim and proceeded to strike him with a two-by-four, knocking out several teeth. Gonzales suffered lacerations, punctures to the face, chest, head and had many teeth missing. Gonzales was admitted to the hospital in serious condition and treated for one hour prior to surgery. He died on November 4, 1985, as a result of the injuries received. The preceding summary of the commitment offense was taken from the Probation Officer's Report, pages two and three dated 4/3/86.

On 11/14/85, Jimenez was arrested and booked for the charge of Murder in the second degree.

2. **Prisoner's Version:** Jimenez stated that his version remains the same as given during his October 1998 Board Report, which is as follows: "I hit the guy with the board in the side, but not with a nail." Jimenez stated he was "kicking back" with some other gang members when they were attacked by some 15 to 20 East Side Longos, armed with sticks and bottles. Jimenez subsequently borrowed a gun, and when the East Side

Longos saw the gun, they ran away. Jimenez stated that he was then told by a friend that one of the Longos was laying down in the alley. Jimenez was mad at the Longos for jumping on him, so he proceeded to the area, picked up a four foot long board with a nail on one end and struck the Longo who was lying on the ground. He denied striking the victim with the nail and stated he only hit him once because he was already injured. Jimenez stated that when he struck the victim, the victim moved a little bit but did not say anything or try to get up. Jimenez left the scene, but as he looked back, he saw his "homeboys" hitting the victim some more. He admitted the victim was not armed when he struck him. Jimenez expressed remorse for his actions. He stated, "I wish I had just run away." The pressure to prove himself to fellow gang members was strong. He stated, "I wish I hadn't done what I did."

3. **Aggravating/Mitigating Circumstances:**

a. **Aggravating Factors:**

- The offense was carried out in a dispassionate and calculated manner.
- The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering.
- The victim was abused, defiled or mutilated during the offense.
- The prisoner has a previous record of violence and assaultive behavior.

b. **Mitigating Factors:** N/A.

B. **Multiple Crime(s):** N/A.

1. **Summary of Crime:** N/A.

2. **Prisoner's Version:** N/A.

II. **PRECONVICTION FACTORS:**

- A. **Juvenile Record:** Jimenez was first arrested at the age of fourteen in 1983. He was arrested for Assault with a Deadly Weapon on 4/21/83. On 6/3/83 a petition was filed and he was made a ward of the court and placed on probation, and sentenced to County Camp. He intervened in a fight, armed with a screwdriver and stabbed the victim. On 12/21/84, a violation of probation petition was filed for Failure to Report to Probation Officer and Follow School Program. On 7/1/85 he was given 55 days in Juvenile Hall with 30 days stayed. Juvenile Information was obtained from Probation Officer's Report, page 6.

- B. **Adult Convictions and Arrests:** Instant offense only.
- C. **Personal Factors:** Jimenez is a 38 year old, undocumented male born on September 16, 1968, in Mexico. He was one of seven siblings born to the union of Jesus and Leanor Jimenez. Both parents reside in Long Beach. Jimenez relates that he came to California with his parents in 1973 from Mexico. Originally, they settled in the Carson area then relocated to Long Beach. He attended Catskill Elementary School, Millikin High School his sophomore year, and Poly High his junior year which he did not complete. It was difficult for his parents to meet all of the needs of such a large family. Jimenez felt he needed to contribute but was unable to help. He stayed away from home at times, rather than see his mother cry because of not having enough food for the family. Jimenez stated he had a closer relationship with his mother than his father, due to his father's drinking and sometimes physical abuse towards his mother. He denies being abused as a child. Jimenez was employed working with his brother-in-law cleaning super market parking lots prior to his incarceration. Jimenez states that he drank beer, smoked marijuana and used PCP usually at parties and he claims he never got into the heavy use of drugs.

III. **POSTCONVICTION FACTORS:**

- A. **Special Programming/Accommodations:** N/A.
- B. **Custody History:** All relevant documents, including hearing transcripts have been considered and all information remains the same. Jimenez has remained at CTF in the general population with Medium A custody. Jimenez is currently assigned to the Computer Repair Shop. (See Post Conviction Progress Report)
- C. **Therapy and Self-Help Activities:** Documents from previous hearings remain valid. Since his last BPH hearing, Jimenez participated in the Alcoholics Anonymous Group. (See Post Conviction Progress Reports)
- D. **Disciplinary History:** Documents from previous hearings remain valid. Jimenez continues to remain disciplinary free.
- E. **Other:** Jimenez attended his Subsequent #5 Parole Consideration Hearing on 5/3/06. Parole was denied for 1 year. The Board recommended that Jimenez remain disciplinary free, participate in self-help programs and group therapy and earn positive chronos.

IV. **FUTURE PLANS:**

A. **Residence:** Upon parole, Jimenez plans to live with his mother, Leonor Jimenez, at 327 E. 17th Street, Long Beach, California 90813. He stated that his family will support him financially. If he is deported to Mexico, he plans to live with his ~~uncle or~~ aunt, Dolores Garcia, 27 de Septiembre #52, San Martin Hgo, Jal. 47153.

~~B.~~ **Employment:** Jimenez stated that his brother will help him obtain a job in order to support himself.

C. **Assessment:** In review of Jimenez' parole plans this counselor does not foresee any problems, however, it is recommended that Jimenez update his support letters prior to his hearing as well as obtain legitimate employment offers.

V. **USINS STATUS:** USINS Hold #A76269448.

VI. **SUMMARY:**

A. Prior to release the prisoner could benefit from:

1. Continuing to be disciplinary free.
2. Participating in self-help and therapy programs.
3. Upgrading vocationally and educationally.

B. This report is based upon a thorough review of Jimenez' Central File and a (1) hour interview with Jimenez.

C. Per the Olson Decision, Jimenez was afforded an opportunity to review his Central File. Refer to CDCR 128-B in the General Chrono Section of the Central File.

D. No accommodation was required per the Armstrong vs. Davis BPH Parole Proceedings Remedial Plan (ARP) for effective communication.

R Brown 2-27-07
R. Brown Date
Correctional Counselor I

D. Carnazzo 2-26-07
D. Carnazzo Date
Correctional Counselor II

I. Guerra 2-27-07
I. Guerra Date
Facility Captain

D. S. Levorse 2/28/07
D. S. Levorse Date
Classification and Parole Representative

BOARD OF PRISON TERMS

STATE OF CALIFORNIA

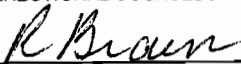
LIFE PRISONER: POSTCONVICTION PROGRESS REPORT

- ☐ DOCUMENTATION HEARING
- ☒ PAROLE CONSIDERATION HEARING
- ☐ PROGRESS HEARING

INSTRUCTIONS

TO CDC STAFF: DOCUMENT EACH 12-MONTH PERIOD FROM THE DATE THE LIFE TERM STARTS TO PRESENT

TO BPT STAFF: FOR EACH 12-MONTH INCREMENT APPLY THE GUIDELINES UNDER WHICH THE PAROLE DATE WAS ORIGINALLY ESTABLISHED, ie., 0-2 MONTHS FOR PBR AND 0-4 MONTHS FOR BPT. SEE BPT §§2290 - 2292, 2410 AND 2439.

POSTCONVICTION CREDIT			REASONS
YEAR	BPT	PBR	
5/6/05 to 8/18/05			<p>PLACEMENT: Remained at CTF in the general population.</p> <p>CUSTODY: Medium A.</p> <p>VOC. TRAINING: None noted this review period.</p> <p>ACADEMICS: None noted this review period.</p> <p>WORK RECORD: Jimenez has been assigned to the Culinary. Jimenez' supervisor report dated 5/9/05 reflects no ratings.</p> <p>GROUP ACTIVITIES: Jimenez has been a member of the Alcoholics Anonymous Group, verified by CDCR 128B dated 8/9/05.</p> <p>PSYCH. TREATMENT: None noted this review period.</p> <p>PRISON BEHAVIOR: Remained disciplinary free this period.</p> <p>OTHER: N/A.</p>
CORRECTIONAL COUNSELOR SIGNATURE			DATE
			2-27-07
JIMENEZ	E49850	CTF-SOLEDAD	MAY/2007

BOARD OF PRISON TERMS

STATE OF CALIFORNIA

CONTINUATION SHEET: LIFE PRISONER : POSTCONVICTION PROGRESS REPORT

POSTCONVICTION CREDIT			REASONS
YEAR	BPT	PBR	
8/19/05 to 8/18/06			PLACEMENT: Remained at CTF in the general population. CUSTODY: Medium A. VOC. TRAINING: None noted this review period. ACADEMICS: None noted this review period. WORK RECORD: Jimenez has been assigned to the Culinary with no Work Supervisor Reports. GROUP ACTIVITIES: Jimenez has been assigned to the Alcoholics Anonymous Group, verified by CDCR 128B dated 10/12/05. PSYCH. TREATMENT: None noted this review period. PRISON BEHAVIOR: Remained disciplinary free this period. OTHER: N/A.

ORDER:

- | | | | | |
|--------------------------|----------------------|---------|--------------------------|-----------------------------------|
| <input type="checkbox"/> | BPT date advanced by | months. | <input type="checkbox"/> | BPT date affirmed without change. |
| <input type="checkbox"/> | PBR date advanced by | months. | <input type="checkbox"/> | PBR date affirmed without change. |

SPECIAL CONDITIONS OF PAROLE:

- ☐ Previously imposed conditions affirmed.
☐ Add or modify
☐ Schedule for Progress Hearing on appropriate institutional calendar

JIMENEZ

E49850

CTF-SOLEDAD

MAY/2007

BOARD OF PRISON TERMS

STATE OF CALIFORNIA

BOARD OF PRISON TERMS

STATE OF CALIFORNIA

CONTINUATION SHEET: LIFE PRISONER : POSTCONVICTION PROGRESS REPORT

POSTCONVICTION CREDIT			REASONS
YEAR	BPT	PBR	
8/19/06 to 12/31/06			PLACEMENT: Remains at CTF in the general population. CUSTODY: Medium A. VOC. TRAINING: None noted this review period. ACADEMICS: None noted this review period. WORK RECORD: Jimenez was assigned to the Culinary until 12/2/06 when he was re-assigned as a Computer Repair Student, with no Work Supervisor Reports. GROUP ACTIVITIES: None noted this review period. PSYCH. TREATMENT: None noted this review period. PRISON BEHAVIOR: Remained disciplinary free this period. OTHER: N/A.

ORDER:

- | | | | | |
|--------------------------|----------------------|---------|--------------------------|-----------------------------------|
| <input type="checkbox"/> | BPT date advanced by | months. | <input type="checkbox"/> | BPT date affirmed without change. |
| <input type="checkbox"/> | PBR date advanced by | months. | <input type="checkbox"/> | PBR date affirmed without change. |

SPECIAL CONDITIONS OF PAROLE:

- ☐ Previously imposed conditions affirmed.
☐ Add or modify
☐ Schedule for Progress Hearing on appropriate institutional calendar

JIMENEZ

E49850

CTF-SOLEDAD

MAY/2007

BOARD OF PRISON TERMS

STATE OF CALIFORNIA

EXHIBIT "D"

CALIFORNIA BOARD OF PAROLE HEARINGS

D E C I S I O N

DEPUTY COMMISSIONER BLONIEN: Okay, we're back on tape.

PRESIDING COMMISSIONER GARNER: All right.

The time is now 2:10 p.m. in the matter of Jose Jimenez; E, Edward, 49850. Mr. Jimenez, the panel has reviewed all the information received from the public and relied on the following circumstances in concluding that you are not suitable for parole and would pose an unreasonable risk of danger to society or a threat to public safety if you were released from prison. We considered many factors, but we started with the commitment offense, and the panel noted that the offense was carried out in an especially cruel and callous manner. We have the victim, Jose Gonzales -- he was nearly beaten to death on the 31st of October in 2000 -- excuse me -- in 1985 and died on November 4th of 1985.

The offense was carried out in a very dispassionate and calculated manner. The victim was on the ground, he was posing no threat, and a shovel was used, a two-by-four with a nail protruding, and a crowbar was used to attack him. The offense was carried out in a manner which

1 demonstrates an exceptionally callous disregard
2 for human suffering in that the victim suffered
3 multiple wounds, lacerations, punctures to the
4 face, chest, and head; and, again, while he was
5 on the ground and posing no threat. The motive
6 for the crime was very trivial; it was gang
7 retaliation; and it's something that,
8 unfortunately, when the gang mentality sets in
9 (indiscernible). Before we go any further, one
10 of the things that both panel members wanted to
11 ask you is are you feeling okay today?

12 **INMATE JIMENEZ:** Yes, sir.

13 **PRESIDING COMMISSIONER GARNER:** You're feeling
14 fine? Okay. All right. The conclusions were
15 drawn from a statement of facts, and that was
16 from the September 2003 Board report in that on
17 October 31st, 1985, three carloads of Eastside
18 Longo gang members including victim, Jose
19 Gonzales, advanced on the territory and
20 confronted rival gang members, including Jimenez,
21 the T-Towners Flat gang, in retaliation for
22 earlier wrongs perpetrated against them. A gang
23 fight ensued. After approximately 10 minutes,
24 the fight broke up; and the Eastside Longo gang
25 members left the area, leaving the victim behind.
26 According to witnesses, co-defendant, Lucero,
27 **JOSE JIMENEZ E-49850 DECISION PAGE 2 5/3/06**

1 chased Gonzales and knocked him to the ground.
2 Then Jimenez and co-defendant, Lucero, from the
3 La Loma gang, and Martinez, from the Barrio Pobre
4 gang, beat unarmed and defenseless Gonzales using
5 a shovel, a two-by-four with a nail, and crowbar.
6 Two female witnesses intervened; and after
7 threatening these witnesses, Jimenez left the
8 scene. Lucero, the co-defendant, however,
9 returned to the victim and proceeded to strike
10 him with the two-by-four, knocking out several
11 teeth. Gonzales suffered lacerations, punctures
12 to the face, chest, head and had many teeth
13 missing. Gonzales was admitted to the hospital
14 in serious condition and treated for one hour
15 prior to surgery. He died on November 4, 1985,
16 as a result of injuries he received. So far as
17 your previous record, the panel noted on previous
18 occasions that you inflicted serious injury on a
19 victim, and the situation was an ADW with a
20 screwdriver, you have a behavior record of
21 violent assaultive behavior and that you failed
22 to profit from society's previous attempts to
23 correct your criminality through county camp,
24 juvenile probation, and a term in juvenile hall.
25 So far as the prior criminality, we've already
26 noted that it was the ADW. Your institutional
27 JOSE JIMENEZ E-49850 DECISION PAGE 3 5/3/06

1 behavior -- the panel noted that you haven't
2 sufficiently participated in beneficial self-help
3 programs. You've indicated you've been involved
4 -- when Commissioner Blonien asked you about the
5 12 Steps, you indicated you weren't working the
6 Steps. In getting commitment to these programs,
7 they're going to be very key in your successful
8 ability to get yourself out of here. So far as
9 your misconduct while incarcerated, you've had
10 six 128s, the last one being September of '95;
11 and this was being absent from an assignment and
12 the 115 that was issued in august of 1993; and
13 this was for not (indiscernible) out during an
14 alarm. So far as the psychological reports that
15 were prepared by Dr. Hewchuk, the one report
16 prepared on 7/26 -- July 26th of '05 -- and
17 February 11 of '05, the panel found that the
18 reports are contradictory because they basically
19 are silent to a significant comment that the
20 Board found in Dr. Gamard's report from July 9th
21 of 2002 with respect to the violence potential.
22 And so, you know, what we've done is we've asked
23 that a new psych report, complete report, be
24 prepared to give the next Board a better idea --
25 excuse me -- as to your current level of
26 potential for violence in the community. An area
27 JOSE JIMENEZ E-49850 DECISION PAGE 4 5/3/06

1 you're going to need to work on is the next one
2 we want to talk to you about, and that's your
3 parole plans. The panel noted that they
4 essentially don't exist, and what you're going to
5 need to do is develop parole plans from both
6 Mexico and in the U.S. And one of the things
7 that I did note after looking at the letter from
8 the Wehner Framing, there's no indication of
9 where it is, so we need to at least have an idea
10 of where they're located. A business license is
11 always helpful. And also some housing
12 opportunities that might be available to you in
13 the United States. So those are a couple of
14 things that you're going to need to start work on
15 fairly soon. So far as the 3042 Notices, the
16 District Attorney from Los Angeles County
17 representative was here; and you heard the
18 comments he made opposing the granting of parole
19 and also the letter that was received from the
20 Long Beach Police Department also indicating
21 opposition to parole. We want to commend you for
22 getting your GED in 1994, for completing Impact
23 in 2004, and for obtaining two vocational
24 certificates, which will be very helpful to you
25 at the time you get yourself a date. So what
26 we're going to do is we're going to deny you for
27 JOSE JIMENEZ E-49850 DECISION PAGE 5 5/3/06

1 one year, encourage you to get to work real quick
2 on the parole plans, get yourself back into self-
3 help as soon as you can, and start working the
4 Steps, because I think as Commissioner Blonien
5 was trying to get out of you is it's not going to
6 the meetings, it's what you get out of it; and
7 getting out of here, it's not about us, it's
8 about you. It's what you bring to the table;
9 it's what you give us to make our decision. So,
10 Commissioner Blonien, anything additional?

11 DEPUTY COMMISSIONER BLONIEN: No. Thank
12 you.

13 PRESIDING COMMISSIONER GARNER: All right.
14 It is now 2:16 p.m., and that concludes this
15 hearing.

16 --oOo--

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22

23 PAROLE DENIED ONE YEAR.

24 THIS DECISION WILL BE FINAL ON: AUG 31 2006.

25 YOU WILL BE PROMPTLY NOTIFIED IF, PRIOR TO THAT
26 DATE, THE DECISION IS MODIFIED.

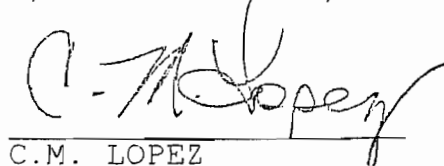
27 JOSE JIMENEZ E-49850 DECISION PAGE 6 5/3/06

CERTIFICATE AND
DECLARATION OF TRANSCRIBER

I, C.M. LOPEZ, a duly designated transcriber, PETERS SHORTHAND REPORTING, do hereby declare and certify under penalty of perjury that I have transcribed tape(s) which total one in number and cover a total of pages numbered 1-44, and which recording was duly recorded at CORRECTIONAL TRAINING FACILITY, SOLEDAD, CALIFORNIA, in the matter of the **SUBSEQUENT** PAROLE CONSIDERATION HEARING OF JOSE JIMENEZ, CDC NO. E-49850, ON MAY 3, 2006, and that the foregoing pages constitute a true, complete, and accurate transcription of the aforementioned tape to the best of my ability.

I hereby certify that I am a disinterested party in the above-mentioned matter and have no interest in the outcome of the hearing.

Dated June 5, 2006, at Sacramento, California.

A handwritten signature in black ink, appearing to read 'C.M. Lopez', is written over a horizontal line.

C.M. LOPEZ
TRANSCRIBER
PETERS SHORTHAND REPORTING

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CALIFORNIA BOARD OF PRISON TERMS

D E C I S I O N

DEPUTY COMMISSIONER BACHLOR: We're
back on record.

PRESIDING COMMISSIONER MOORE: All
right. Let the record show that all
interested parties have returned to the room.
Jose Jimenez, E as in Edward 49850. This Panel
has reviewed all information received from the
public and relied on the following
circumstances in concluding that the prisoner
is not suitable for parole and would pose an
unreasonable risk of danger to society or a
threat to public safety, if released from
prison at this time. The paramount reasoning
would be the timing and the gravity of the
committing offense. (Inaudible.) This was a
gang fight involving rival gangs, the T-Town
Flats gang versus the Eastside Longos gang.
And the prisoner was involved in the midst of
this fight, this gang fight situation that took
place. The actual battle had already subsided.
When police had been summoned, the masses had
started to leave the location. However,
subsequent to that, the prisoner and his crime
partners found a -- one of the rival gang

JOSE JIMENEZ E-49850 DECISION PAGE 1 11/6/03

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1 members hiding in a nearby alley area. And
2 then he was set upon by the prisoner and his
3 crime partners. The prisoner did strike the
4 victim three times, at least, with a two by
5 four. The victim succumbed to his injuries.
6 As well as, the victim was somewhat abused and
7 mutilated, in that the victim suffered
8 lacerations, punctures to his face, chest,
9 head, and many of his teeth happened to be
10 knocked out. The victim was set upon with the
11 two by four, nails in it, a crowbar, a shovel.
12 The offense was carried out in a manner, which
13 demonstrates exceptionally insensitive
14 disregard for human suffering. And the motive
15 for the crime was inexplicable and very trivial
16 in relationship. As I mentioned, this was
17 about retaliation for the wrongdoings of the
18 rival gang. These conclusions are drawn from
19 the Statement of Facts, wherein the prisoner
20 and his crime partners caused the demise of
21 Jose Gonzales in a street gang fight, a rival
22 gang retaliation. Previous record, the
23 prisoner has, on previous occasions, inflicted
24 or attempted to inflict serious injury on
25 another victim. The prisoner was arrested as a
26 juvenile for assault with a deadly weapon. As
27 JOSE JIMENEZ E-49850 DECISION PAGE 2 11/6/03

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1 well as, the prisoner had an escalating pattern
2 at the time of the instant offense of criminal
3 conduct. He had a history of unstable and
4 tumultuous relationships with others commencing
5 at an early age, dropping out of school,
6 developing a problem with substance abuse of
7 alcohol and drugs. He has failed previous --
8 to profit from society's previous attempts to
9 correct his criminality. Such attempts
10 included probation, a felony juvenile camp,
11 juvenile hall time. The prisoner had an
12 unstable social history and prior criminality,
13 which includes the use, as I mentioned, of --
14 and abuse of drugs and alcohol. As well as an
15 active participation in the street gang's
16 lifestyle. Institutionally, the prisoner has
17 programmed in a limited manner. He's made some
18 efforts to attempt to complete an additional
19 vocation. He has not sufficiently participated
20 in beneficial self-help and therapy programming
21 at this time. He's recently gotten back into
22 AA. He was on the waiting list last time. As
23 well as a vocational trade that was -- he has
24 almost completed. He has not yet completed the
25 Printing, Graphic Arts trade at this time.
26 He's gotten no new 115s. The last one was in
27 **JOSE JIMENEZ E-49850 DECISION PAGE 3 11/6/03**

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1 '93. The psychosocial report, authored by
2 William Gamard, Ph.D., Staff Psychologist,
3 Gamard, G-A-M-A-R-D, written July the 5th of
4 2002, is not totally supportive. In that, the
5 doctor -- in the doctor's opinion, that the
6 prisoner's violence potential is not more than
7 slightly higher than the average citizen in the
8 community. Parole plans, the prisoner lacks
9 realistic parole plans in the last county of
10 legal residence for the commitment county. He
11 does have some alternative plans, however, none
12 because he has a US INS hold and he had no
13 letters from Mexico today. Thirty forty-two
14 notices, the hearing Panel notes responses to
15 3042 notices indicate opposition.

16 Specifically, the District Attorney's Office of
17 Los Angeles County. As well as the Long Beach
18 Police Department, a letter received on
19 September the 26th of this year from Sergeant
20 Paul Arcala, Homicide detail, the investigating
21 office or agency, is in opposition to a finding
22 of suitability. The prisoner's counselor, a
23 CC-I W. Poole, P-O-O-L-E, wrote that, in the
24 prisoner's -- the current Board report of the
25 prisoner, he would pose a moderate degree of
26 threat, if released to the public at this time.

27 JOSE JIMENEZ E-49850 DECISION PAGE 4 11/6/03

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1 Remarks, the prisoner still needs some self-
2 help in order to face, discuss, understand and
3 cope with stress in a nondestructive manner, to
4 better understand the causative factors,
5 ~~Mr.~~ Jimenez. And until progress is made, the
6 prisoner continues to be unpredictable and a
7 threat to others. The prisoner's gains are
8 recent. He must demonstrate the ability to
9 maintain these gains over an extended period of
10 time. I'm talking about possible completions
11 of a program and just recently getting back
12 into AA. He still needs to do some work in
13 terms of working on the 12-Steps.

14 Nevertheless, the prisoner should be commended.
15 He already has one marketable trade, in terms
16 of Landscaping, Horticulture. He's
17 accomplished a GED. He's doing some positive
18 kinds of things. He's made the turn. However,
19 these positive aspects of his behavior don't
20 outweigh the factors of unsuitability at this
21 time. Mr. Jimenez, this would be a one-year
22 denial, another one-year denial, Mr. Jimenez,
23 for you. And the recommendations are to remain
24 disciplinary free. If it's available to you,
25 to upgrade, complete that vocation, that second
26 vocation that you're attempting to do. You

27 **JOSE JIMENEZ E-49850 DECISION PAGE 5 11/6/03**

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1 said probably a month and it should be out of
2 your way. I'm wishing you good luck in that
3 regard. As well as, if it's available to you,
4 to participate in beneficial self-help and
5 therapy programming, whatever may be available,
6 in order to better understand the causative
7 factors, as I mentioned. Commissioner, any
8 comments to this prisoner?

9 **DEPUTY COMMISSIONER BACHLOR:** Yeah.
10 I'd strongly recommend that you continue in the
11 NA/AA and you learn those 12 steps. Whether or
12 not you think you had a problem, there is
13 indication you were using marijuana at a young
14 age. But you can also use those 12 steps for a
15 lot more than just drugs and alcohol recovery.
16 So, I'd really recommend you focus on that in
17 this next year and just keep doing well.
18 You're doing very well and I think you're
19 getting close, as long as you stay on the track
20 you're on. All right?

21 **INMATE JIMENEZ:** Thank you.

22 **DEPUTY COMMISSIONER BACHLOR:** Good
23 luck.

24 **PRESIDING COMMISSIONER MOORE:** That
25 will conclude the hearing today, Mr. Jimenez.
26 The time is 1245 hours. Good luck to you, sir.
27 **JOSE JIMENEZ E-49850 DECISION PAGE 6 11/6/03**

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1 INMATE JIMENEZ: Thank you.

2 PRESIDING COMMISSIONER MOORE:

3 Mr. Spowart, have a good one.

4 ATTORNEY SPOWART: Yeah. The same to
5 you, Commissioner.

6 PRESIDING COMMISSIONER MOORE: I see
7 you're working here in a couple of weeks, the
8 17th?

9 ATTORNEY SPOWART: The 17th. Are you
10 going to be here?

11 PRESIDING COMMISSIONER MOORE: I'm back
12 again. Of course, there will be two Panels
13 here that week, so --

14 ATTORNEY SPOWART: (Inaudible.)

15 PRESIDING COMMISSIONER MOORE: -- I
16 don't know which one we're on but I'll see you
17 then.

18 ATTORNEY SPOWART: Okay.

19 --o0o--

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25 PAROLE DENIED ONE YEAR

26 FINAL DATE OF DECISION _____

27 JOSE JIMENEZ E-49850 DECISION PAGE 7 11/6/03

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DECLARATION OF TRANSCRIBER**

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I hereby certify that I am a disinterested party in the above-captioned matter and have no interest in the outcome of the hearing.

Dated November 18th, 2003, at Sacramento County, California.



Karin R. Lewis
Transcriber
CAPITOL ELECTRONIC REPORTING

CALIFORNIA BOARD OF PRISON TERMS

D E C I S I O N

DEPUTY COMMISSIONER LEHMAN: We're back on the record.

PRESIDING COMMISSIONER MUNOZ: All right. Twelve minutes after 11:00 a.m. and the Parole Consideration Hearing for Inmate Jimenez has resumed with all parties having returned to the hearing room. And Mr. Jimenez, this Panel reviewed all information received from the public and relied on the following circumstances in concluding that you are unsuitable for parole and that you would pose an unreasonable risk of danger to society if released from prison at this time. After considering many factors, my colleague and I decided on a one year denial in your case. We -- As I said, we did consider many factors (inaudible) commitment offense and its nature. The commitment offense was carried out in a cruel manner which a callous disregard for human suffering. The motive for this crime was trivial, a gang related crime, obviously. It was a gang related crime, obviously. These crimes are always trivial and inexcusable. The victim was abused, beat and somewhat mutilated during the commission of this crime. He had (inaudible) of his teeth knocked out. These

1 conclusions were drawn from the Statement of Facts
2 wherein the prisoner had become involved in a gang
3 fight situation involving rivals of the (inaudible)
4 the actual gang party. The actual battle had been
5 waged and over, and the police had come, and
6 everybody was dispersed. A rival gang member was
7 located in a nearby alley and was then set upon by
8 the inmate and his crime partners. The inmate did
9 strike the victim three times, at least, with a
10 board. And the inmate -- the victim succumbed to
11 his injuries. And this Panel feels the inmate had
12 a direct cause in the demise of a human being.
13 This inmate does have an unstable social history
14 and prior criminality, which includes the use and
15 abuse of drugs and his active participation in the
16 street gang lifestyle. He has on a previous
17 occasion inflicted serious injury on a victim.
18 That was an arrest as a juvenile, ADW. He was, at
19 the time of the commitment offense, involved in an
20 escalating pattern of criminal conduct. And apart
21 of the gang activity, he also was a high school
22 dropout, and he has failed previous grants of
23 probation and failed to profit from society's
24 previous attempts to control his criminality. Such
25 attempts include juvenile conviction that I
26 mentioned, placement in felony juvenile camp, and
27 JOSE JIMENEZ E-49850 DECISION PAGE 2 9/26/02

1 also juvenile hall as a result of violating his
2 probation. And in regards to this offense, he was
3 initially placed in CYA. Institutional behavior,
4 this Panel feels he has not sufficiently
5 participated in beneficial self-help and therapy
6 programming, and his disciplinary record when
7 compared to the inmate (inaudible) this Panel, his
8 disciplinary record is pretty good. He has one 115
9 during his period of incarceration. That was way
10 back in 1993, nine years ago. He has a total of
11 six 128(a)'s, the last one in 1995. The most
12 recent psychiatric evaluation is not totally
13 supportive of release. It was authored by
14 Dr. Ganard and dated 7/5/02. And he opined that
15 the inmate's violence potential is no more than
16 slightly higher than average -- than the average
17 citizen in the community. And Mr. Spowart, the
18 inmate's attorney, pointed out, the prior
19 evaluation was -- had a better (inaudible) than
20 this one. So, even though the psych report is
21 fairly recent, we are going to order another psych
22 report before the next appearance before the Board
23 of Prison Terms. We'll try to get that ironed out.
24 As far as your parole plans go, sir, what I suggest
25 to you is that you submit dual option parole plans
26 the next time you come before the Panel. Plans are
27 JOSE JIMENEZ E-49850 DECISION PAGE 3 9/26/02

1 to be clearly outlined for both your country of
2 origin, and because the possibility exists,
3 although it's a small possibility that you'll be
4 allowed to remain in California, go ahead and
5 submit those types of plans too and have letters of
6 support and confidential from both locations. We
7 note that the District Attorney from the County of
8 Los Angeles is opposed to parole suitability for
9 you. And we make the following findings. That you
10 need to at least disciplinary wise stay on the path
11 that you're on. You behave yourself well. Keep it
12 up. And we appreciate that. And you also indicate
13 you're on the waiting list for AA, NA, and that's a
14 good idea for you to resume that kind of
15 participation. And you are to be commended for
16 some of things you've accomplished during the
17 period of incarceration. You did obtain your GED.
18 You completed a vocation in landscape and
19 horticulture vocation, and you're currently
20 involved in the printing vocation. You've received
21 laudatory chronos for that, and we certainly hope
22 you complete that vocation also. Anything that you
23 can do to enhance -- to enhance your chance to
24 obtain parole suitability we urge you to do. The
25 positive aspects of your behavior do not outweigh
26 the factors of unsuitability. Again, sir, this is
27 JOSE JIMENEZ E-49850 DECISION PAGE 4 9/26/02

1 a one year denial, and you may be disappointed at
2 the outcome of this hearing, but we hope you
3 interpret the one year denial as a good sign, as
4 encouragement from this Panel that you are headed
5 in the right direction. You had a four year denial
6 last time you appeared, so the fact that you had
7 three years lopped off is a good sign (inaudible).
8 We were impressed by the presentation both by your
9 attorney and also by the way you presented
10 yourself. So, if you are disappointed, sir, don't
11 let that disappointment turn to bitterness. Keep
12 doing what you're doing. You have the potential to
13 get out of this prison someday. And Commissioner
14 Lehman, any comments you want to add, Sir?

15 DEPUTY COMMISSIONER LEHMAN: I'd just like
16 to reiterate what you said in regard to the four
17 year denial previously and a one year denial today,
18 sir. That's -- I would say -- I would call it
19 unusual. Usually, people do not go in that
20 progression. But you -- I think your performance
21 in prison has been remarkable for a lot of the
22 reasons we talked about here today. And what this
23 means for you is that in all likelihood, if you
24 don't get into any trouble or you don't, you know,
25 backtrack in any way, you'll probably get a parole
26 hearing every year. I can't promise that.

60

1 Anything is possible, but you probably will now.
2 And that's going to be -- greatly increase your
3 chances of walking out of here someday. And I just
4 want to commend you for your good work and tell you
5 good luck.

6 **PRESIDING COMMISSIONER MUNOZ:** (Inaudible).
7 Thank you for being here this morning. It's 20
8 minutes after 11:00 a.m. That concludes the
9 hearing for Mr. Jimenez.

10 --oOo--

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25 **PAROLE DENIED ONE YEAR**

26 **EFFECTIVE DATE OF THIS DECISION**

OCT 18 2002

27 **JOSE JIMENEZ E-49850 DECISION PAGE 6 9/26/02**

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DECLARATION OF TRANSCRIBER

I, DEBRA M. SEVEY, a duly designated transcriber, CAPITOL ELECTRONIC REPORTING, do hereby declare and certify under penalty of perjury that I have transcribed tape(s) which total one in number and cover a total of pages numbered 1 through 60, and which recording was duly recorded at CORRECTIONAL TRAINING FACILITY, at SOLEDAD, CALIFORNIA, in the matter of the SUBSEQUENT PAROLE CONSIDERATION HEARING of JOSE JIMENEZ, CDC No. E-49850, on SEPTEMBER 26, 2002, and that the foregoing pages constitute a true, complete, and accurate transcription of the aforementioned tape(s) to the best of my ability.

I hereby certify that I am a disinterested party in the above-captioned matter and have no interest in the outcome of the hearing.

Dated October 9, 2002 at Sacramento County, California.



Debra M. Sevey
Transcriber
CAPITOL ELECTRONIC REPORTING

EXHIBIT "E"

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

(ENDORSED)
FILED
AUG 30 2007
KIRI TORRE
Chief Executive Officer/Clerk
Superior Court of California, County of Santa Clara
BRET MORROW DEPUTY

In re)
DONALD RAY LEWIS,)
On Habeas Corpus)
No.: 68038
ORDER

INTRODUCTION

Petitioner alleges that he has been denied due process of law because the Board has used standards and criteria which are unconstitutionally vague in order to find him unsuitable for parole. Alternatively, he argues that those standards, even if constitutionally sound, are nonetheless being applied in an arbitrary and meaningless fashion by the Board. He relies upon evidence that in one hundred percent of 2690 randomly chosen cases, the Board found the commitment offense to be "especially heinous, atrocious or cruel", a factor tending to show unsuitability under Title 15 §2402(c)(1).

Are the Board Criteria Unconstitutionally Vague?

Our courts have long recognized that both state and federal due process requirements dictate that the Board must apply detailed standards when evaluating whether an individual inmate is unsuitable for parole on public safety grounds. (See *In re Dannenberg* (2005) 34

1 Cal.4th 1061 at p. 1096, footnote 16.) Those standards are found in
 2 15 CCR §2402(c) (*Dannenberg, supra*, 34 Cal.4th at p. 1080,) and do
 3 include detailed criteria to be applied by the Board when considering
 4 the commitment offense:

5 (c) Circumstances Tending to Show Unsuitability. The following
 6 circumstances each tend to indicate unsuitability for release.
 7 These circumstances are set forth as general guidelines; the
 8 importance attached to any circumstance or combination of
 9 circumstances in a particular case is left to the judgment of
 10 the panel. Circumstances tending to indicate unsuitability
 11 include:

12 (1) Commitment Offense. The prisoner committed the offense in an
 13 especially heinous, atrocious or cruel manner. The factors to be
 14 considered include:

15 (A) Multiple victims were attacked, injured or killed in
 16 the same or separate incidents.

17 (B) The offense was carried out in a dispassionate and
 18 calculated manner, such as an execution-style murder.

19 (C) The victim was abused, defiled or mutilated during or
 20 after the offense.

21 (D) The offense was carried out in a manner which
 22 demonstrates an exceptionally callous disregard for human
 23 suffering.

24 (E) The motive for the crime is inexplicable or very
 25 trivial in relation to the offense.

26 In response to Petitioners claim that the regulations are
 27 impermissibly vague, Respondent argues that while "especially
 28 heinous, atrocious or cruel" might be vague in the abstract it is
 limited by factors (A)-(E) of §2402(c)(1), and thus provides a
 'principled basis' for distinguishing between those cases which are
 contemplated in that section and those which are not. An examination
 of cases involving vagueness challenges to death penalty statutes is
 instructive here and shows that Respondent's position has merit:

"Our precedents make clear that a State's capital sentencing

1 scheme also must genuinely narrow the class of persons eligible
2 for the death penalty. When the purpose of a statutory
3 aggravating circumstance is to enable the sentencer to
4 distinguish those who deserve capital punishment from those who
5 do not, the circumstance must provide a principled basis for
6 doing so. If the sentencer fairly could conclude that an
7 aggravating circumstance applies to every defendant eligible for
8 the death penalty, the circumstance is constitutionally infirm."
9 (*Arave v. Creech* (1993) 507 U.S. 463, 474, citing *Maynard v.*
10 *Cartwright* (1988) 486 U.S. 356, 364: "invalidating aggravating
11 circumstance that 'an ordinary person could honestly believe'
12 described every murder," and, *Godfrey v. Georgia* (1980) 446 U.S.
13 420, 428-429: "A person of ordinary sensibility could fairly
14 characterize almost every murder as 'outrageously or wantonly
15 vile, horrible and inhuman.'")

16 It cannot fairly be said that 'every murder' could be
17 categorized as "especially heinous, atrocious or cruel" under the
18 Board regulations, since the defining factors contained in
19 subdivisions (A)-(E) clearly narrow the group of cases to which it
20 applies. Although Petitioner also argues that the "vague statutory
21 language is not rendered more precise by defining it in terms or
22 synonyms of equal or greater uncertainty" (*People v. Superior Court*
23 (*Engert*) (1982) 31 Cal.3d 797, 803, *Pryor v. Municipal Court* (1979)
24 25 Cal.3d 238, 249. See also *Walton v. Arizona* (1990) 497 U.S. 639,
25 654), the factors in those subdivisions are not themselves vague or
26 uncertain. The mere fact that there may be some subjective component
27 (such as "exceptionally callous" disregard for human suffering) does
28 not render that factor unconstitutionally vague. The proper degree
of definition of such factors is not susceptible of mathematical
precision, but will be constitutionally sufficient if it gives
meaningful guidance to the Board.

A law is void for vagueness if it "fails to provide adequate
notice to those who must observe its strictures and
impermissibly delegates basic policy matters to policemen,
judges, and juries for resolution on an ad hoc and subjective
basis, with the attendant dangers of arbitrary and

1 discriminatory application." (*People v. Rubalcava* (2000) 23
2 Cal.4th 322, 332, quoting *People ex rel. Gallo v. Acuna* (1997)
3 14 Cal. 4th 1090, 1116, quoting *Grayned v. City of Rockford*
4 (1972) 408 U.S. 104, 108-109.)

5 A review of cases expressing approval of definitions to limit the
6 application of otherwise vague terms in death penalty statutes leads
7 inextricably to the conclusion that the limiting factors in §2402(c)
8 easily pass constitutional muster. An Arizona statute was upheld
9 that provided a crime is committed in an 'especially cruel manner'
10 when the perpetrator inflicts mental anguish or physical abuse before
11 the victim's death," and that "mental anguish includes a victim's
12 uncertainty as to his ultimate fate." (*Walton v. Arizona* (1990) 497
13 U.S. 639, 654.) Similarly, the court in *Maynard v. Cartwright*, 486
14 U.S. at 364-365, approved a definition that would limit Oklahoma's
15 "especially heinous, atrocious, or cruel" aggravating circumstance to
16 murders involving "some kind of torture or physical abuse. In
17 Florida, the statute authorizing the death penalty if the crime is
18 "especially heinous, atrocious, or cruel," satisfied due process
19 concerns where it was further defined as "the conscienceless or
20 pitiless crime which is unnecessarily torturous to the victim."
21 *State v. Dixon* (1973) 283 So. 2d 1 at p. 9.

22 Here, the factors in subdivisions (A)-(E) provide equally clear
23 limiting construction to the term "especially heinous, atrocious, or
24 cruel" in §2402(c).

25 Has the Board Engaged in a Pattern of Arbitrary Application of the
26 Criteria?

27 As previously noted, 15 CCR §2402 provides detailed criteria for
28 determining whether a crime is "exceptionally heinous, atrocious or
29 cruel" such that it tends to indicate unsuitability for parole. Our
30

1 courts have held that to fit within those criteria and thus serve as
2 a basis for a finding of unsuitability, the circumstances of the
3 crime must be more aggravated or violent than the minimum necessary
4 to sustain a conviction for that offense. (*In re Rosenkrantz* (2002)
5 29 Cal.4th 616, 682-683.) Where that is the case, the nature of the
6 prisoner's offense, alone, can constitute a sufficient basis for
7 denying parole. (*In re Dannenberg, supra*, 34 Cal.4th at p. 1095.)

8 Petitioner claims that those criteria, even if constitutionally
9 sound, have been applied by the Board in an arbitrary and capricious
10 manner rendering them devoid of any meaning whatever. The role of
11 the reviewing court under these circumstances has been addressed
12 previously in the specific context of Parole Board actions:

13 "[Courts have] an obligation, however, to look beyond the facial
14 validity of a statute that is subject to possible
15 unconstitutional administration since a law though fair on its
16 face and impartial in appearance may be open to serious abuses
17 in administration and courts may be imposed upon if the
18 substantial rights of the persons charged are not adequately
19 safeguarded at every stage of the proceedings. We have
20 recognized that this court's obligation to oversee the execution
21 of the penal laws of California extends not only to judicial
22 proceedings, but also to the administration of the Indeterminate
23 Sentence Law." (*In re Rodriguez* (1975) 14 Cal.3d 639, 648,
24 quoting *Minnesota v. Probate Court* (1940) 309 U.S. 270, 277.)

25 Similarly, in *In re Minnis* (1972) 7 Cal.3d 639, 645, the case
26 closest on point to the present situation, the California Supreme
27 Court stated: "This court has traditionally accepted its
28 responsibility to prevent an authority vested with discretion from
implementing a policy which would defeat the legislative motive for
enacting a system of laws." Where, as here, the question is whether
determinations are being made in a manner that is arbitrary and
capricious, judicial oversight "must be extensive enough to protect

1 limited right of parole applicants 'to be free from an arbitrary
 2 parole decision... and to something more than mere pro-forma
 3 consideration.'" (*In re Ramirez* (2001) 94 Cal.App.4th 549 at p. 564,
 4 quoting *In re Sturm* (1974) 11 Cal.3d 258 at p. 268.)

5 This Court, therefore, now examines Petitioner's "as applied"
 6 void for vagueness challenge.

7 8 The Evidence Presented

9 A similar claim to those raised here, involving allegations of
 10 abuse of discretion by the Board in making parole decisions, was
 11 presented to the Court of Appeal in *In re Ramirez, supra*. The court
 12 there observed that such a "serious claim of abuse of discretion"
 13 must be "adequately supported with evidence" which should be
 14 "comprehensive." (*Ramirez, supra*, 94 Cal.App.4th at p. 564, fn. 5.)
 15 The claim was rejected in that case because there was not "a
 16 sufficient record to evaluate." (*Ibid.*) In these cases, however,
 17 there is comprehensive evidence offered in support of Petitioner's
 18 claims.

19 Discovery orders were issued in five different cases involving
 20 life term inmates (Petitioners) who all presented identical claims.¹

21
 22 ¹ This Court takes judicial notice of the several other cases currently
 23 pending (Criscione #71614, Jameison #71194, Bragg #108543, Ngo #127611.)
 24 which raise this same issue and in which proof was presented on this same
 25 point. (Evidence Code § 452(d). See specifically, in the habeas corpus
 26 context, *In re Vargus* (2000) 83 Cal.App.4th 1125, 1134-1136, 1143, in which
 27 judicial notice was taken of the evidence in four other cases and in which
 28 the court noted: "Facts from other cases may assist petitioner in
 establishing a pattern." See generally *McKell v. Washington Mutual, Inc.*
 (2006) 142 Cal.App.4th 1457, 1491: "trial and appellate courts ... may
 properly take judicial notice of ... established facts from both the same
 case and other cases." And see *AB Group v. Wertin* (1997) 59 Cal.App.4th
 1022, 1036: Judicial notice taken of other cases when matters are "just as
 relevant to the present [case] as they are to the others.")

1 The purpose of the discovery was to bring before the Court a
2 comprehensive compilation and examination of Board decisions in a
3 statistically significant number of cases. The Board decisions under
4 examination consisted of final decisions of the Board for life-term
5 inmates convicted of first or second degree murder and presently
6 eligible for parole. Included were all such decisions issued in
7 certain months, chosen by virtue of their proximity in time to the
8 parole denials challenged in the pending petitions. All Board
9 decisions in the months of August, September and October of 2002,
10 July, August, September, October, November, and December of 2003,
11 January and February of 2004, February of 2005, and January of 2006
12 were compiled. This resulted in a review of 2690 cases decided in a
13 total of 13 months.

14 The purpose of the review was to determine how many inmates had
15 actually been denied parole based in whole or in part on the Board's
16 finding that their commitment offense fits the criteria set forth in
17 Title 15 §2402(c)(1) as "especially heinous, atrocious or cruel." A
18 member of the research team conducting the review, Karen Rega,
19 testified that in its decisions the Board does not actually cite CCR
20 rule §2402(c), but consistently uses the specific words or phrases
21 ("verbiage from code") contained therein, so that it could easily be
22 determined when that criteria was being applied. (For example,
23 finding "multiple victims" invokes §2402(c)(1)(A); finding the crime
24 "dispassionate" "calculated" or "execution style" invokes
25 §2402(c)(1)(B); that a victim was "abused" "mutilated" or "defiled"
26 invokes §2402(c)(1)(C); a crime that is "exceptionally callous" or
27 demonstrated a "disregard for human suffering" fits criteria
28

1 evidence" was noted as possibly being dispositive. And see *People v.*
2 *Flores* (2006) 144 Cal.App.4th 625 in which a statistical survey and
3 analysis, combined into an "actuarial instrument" was substantial
4 proof.)

5 A statistical compilation and examination such as has been
6 presented in these cases is entirely appropriate and sufficient
7 evidence from which to draw sound conclusions about the Board's
8 overall methods and practices.

9 10 THE EXPERT'S TESTIMONY

11 Petitioners provided expert testimony from Professor Mohammad
12 Kafai regarding the statistics and the conclusions that necessarily
13 follow from them. Professor Kafai is the director of the statistics
14 program at San Francisco State University, he personally teaches
15 statistics and probabilities, and it was undisputed that he was
16 qualified to give the expert testimony that he did. No evidence was
17 presented that conflicts or contradicts the testimony and conclusions
18 of Professor Kafai. By stipulation of the parties, Professor Kafai's
19 testimony was to be admissible and considered in the cases of all
20 five petitioners. (See page 35 of the June 1, 2007, evidentiary
21 hearing transcript.)

22 Professor Kafai testified that the samples in each case, which
23 consisted of two or three months of Board decisions, are
24 statistically sufficient to draw conclusions about the entire
25 population of life term inmates currently facing parole eligibility
26 hearings. Given that every inmate within the statistically
27 significant samples had his or her crime labeled "particularly
28

1 egregious' " or "especially heinous, atrocious or cruel" under Title
2 15 §2402(c)(1), it can be mathematically concluded that the same
3 finding has been made for every inmate in the entire population of
4 9,750. Although he testified that statisticians never like to state
5 unequivocally that something is proven to a 100% certainty, (because
6 unforeseen anomalies are always theoretically possible,) he did
7 indicate the evidence he had thus far examined came as close to that
8 conclusion as could be allowed. Not surprisingly, Professor Kafai
9 also testified that "more than 50% can't by definition constitute an
10 exception."

11 Having found the data provided to the expert to be sound this
12 Court also finds the expert's conclusions to be sound. In each of
13 the five cases before the Court over 400 inmates were randomly chosen
14 for examination. That number was statistically significant and was
15 enough for the expert to draw conclusions about the entire population
16 of 9,750 parole eligible inmates. The fact that the approximately
17 2000 inmates examined in the other cases also had their parole denied
18 based entirely or in part on the crime itself (§2402(c)(1)), both
19 corroborates and validates the expert's conclusion in each individual
20 case and also provides an overwhelming and irrefutable sample size
21 from which even a non expert can confidently draw conclusions.

22 23 DISCUSSION

24 Although the evidence establishes that the Board frequently says
25 parole is denied "first," "foremost," "primarily," or "mainly,"
26 because of the commitment offense, this statement of primacy or
27 weight is not relevant to the question now before the Court.

Petitioners acknowledge that the Board generally also cites other reasons for its decision. The question before this Court, however, is not whether the commitment offense is the primary or sole reason why parole is denied -- the question is whether the commitment offense is labeled "'particularly egregious'" and thus could be used, under *Dannenberg*, primarily or exclusively to deny parole.

The evidence proves that in a relevant and statistically significant period where the Board has considered life term offenses in the context of a parole suitability determination, every such offense has been found to be "particularly egregious" or "especially heinous, atrocious or cruel."² This evidence conclusively demonstrates that the Board completely disregards the detailed standards and criteria of §2402(c). "Especially" means particularly, or "to a distinctly greater extent or degree than is common."³ (EC § 451(e).) By simple definition the term "especially" as contained in section 2402(C)(1) cannot possibly apply in 100% of cases, yet that is precisely how it has been applied by the Board. As pointed out by the Second District Court of Appeal, not every murder can be found to be "atrocious, heinous, or callous" or the equivalent without "doing

² In a single case out of the 2690 that were examined Petitioner has conceded that the Board did not invoke §2402(c)(1). This Court finds that concession to be improvidently made and the result of over caution. When announcing the decision at the initial hearing of S. Fletcher (H-10330) on 4/6/06, the commissioner did begin by stating "I don't believe this offense is particularly aggravated..." However the commissioner proceeds to describe the crime as a drug deal to which Fletcher brought a gun so "we could say there was some measure of calculation in that." The commissioner continued by observing that the reason someone would bring a gun to a drug transaction was to make sure things went according to their plan "so I guess we can say that that represents calculation and perhaps it's aggravated to that extent." As is the Board's standard practice, by using the word 'calculated' from §2402(c)(1)(b) the Board was invoking that regulation. Certainly if Mr. Fletcher had brought a habeas petition Respondent's position would be that there is 'some evidence' supporting this. The ambiguity created by the commissioner's initial statement was cleared up several pages later when he announces that "based upon the crime coupled with ..." parole was denied for four years. (See *In re Burns* (2006) 136 Cal.App.4th 1318, 1326, holding §2402(c)(1) criteria are necessary for a multi-year denial.)

1 violence" to the requirements of due process. (*In re Lawrence* (2007)
2 150 Cal.App.4th 1511, 1557.) This is precisely what has occurred
3 here, where the evidence shows that the determinations of the Board
4 in this regard are made not on the basis of detailed guidelines and
5 individualized consideration, but rather through the use of all
6 encompassing catch phrases gleaned from the regulations.

7 8 THE BOARD'S METHODS

9 Because it makes no effort to distinguish the applicability of
10 the criteria between one case and another, the Board is able to force
11 every case of murder into one or more of the categories contained in
12 §2402(c).

13 For example, if the inmate's actions result in an instant death
14 the Board finds that it was done in a "dispassionate and calculated
15 manner, such as an execution-style murder." At the same time the
16 Board finds that a murder not resulting in near instant death shows a
17 "callous disregard for human suffering" without any further analysis
18 or articulation of facts which justify that conclusion. If a knife
19 or blunt object was used, the victim was "abused, defiled, or
20 mutilated." If a gun was used the murder was performed in a
21 "dispassionate and calculated manner, such as an execution-style
22 murder." If bare hands were used to extinguish another human life
23 then the crime is "particularly heinous and atrocious."

24 Similarly, if several acts, spanning some amount of time, were
25 necessary for the murder the Board may deny parole because the inmate
26 had "opportunities to stop" but did not. However if the murder was

27 ³ Princeton University World Net Dictionary (2006).
28

1 A "petitioner's young age at the time of the offense" must be
 2 considered. (*In re Elkins* (2006) 144 Cal.App.4th 475, 500, quoting
 3 *Rosenkrantz v. Marshall* (C.D.Cal. 2006) 444 F. Supp. 2d 1063, 1065,
 4 1085: "The reliability of the facts of the crime as a predictor for
 5 his dangerousness was diminished further by his young age of 18, just
 6 barely an adult. 'The susceptibility of juveniles to immature and
 7 irresponsible behavior means their irresponsible conduct is not as
 8 morally reprehensible as that of an adult.'")⁵

9 The Board's formulaic practice of stating §2402(c)(1) phrased in
 10 a conclusory fashion, and then stating "this is derived from the
 11 facts" without ever linking the two together, is insufficient. (*In*
 12 *re Roderick*, (2007) ____ Cal.App.4th ____ (A113370): "At minimum, the
 13 Board is responsible for articulating the grounds for its findings
 14 and for citing to evidence supporting those grounds." (See also *In*
 15 *re Barker* (2007) 151 Cal.App.4th 346, 371, disapproving
 16 "conclusorily" announced findings.)

17 After two decades, mundane "crimes have little, if any,
 18 predictive value for future criminality. Simply from the passing of
 19 time, [an inmate's] crimes almost 20 years ago have lost much of
 20 their usefulness in foreseeing the likelihood of future offenses than
 21 if he had committed them five or ten years ago." (*In re Lee* (2006)
 22 143 Cal.App.4th 1400, 1412.) It should be noted that this rule

23 willfulness and bias. The jury had a reasonable doubt that Petitioner committed
 24 first degree murder but under the Board's 'reasoning' and 'analysis' this puts him
 25 in a worse position than if they had not. Had the jury convicted him of the
 26 greater offense Petitioner has served so much time that he would already be having
 27 subsequent parole hearings on a first and the Board would not have been able to use
 28 the 'some evidence' of first degree behavior against him. As observed previously,
 the Board's position in this regard is "so ridiculous that simply to state it is to
 refute it." (*Weider, supra*, 145 Cal.App.4th at p. 583.)

⁵ This point is particularly significant in the case of Mike Ngo. Mr. Ngo was only
 18 at the time of his crime. The impetus behind the shooting was youth group or

1 applies with even more force when the Board is relying on any
2 criminality that occurred before the crime. In that situation, just
3 as with the crime itself, the Board must explain why such old events
4 have any relevance and especially when the inmate has spent a decade
5 as a model prisoner.

6 Murders situationally related to intimate relationships are
7 unfortunately commonplace because emotions are strongest in such
8 domestic settings. When a murder occurs because of "stress unlikely
9 to be reproduced in the future" this is a factor that affirmatively
10 points towards suitability. (*In re Lawrence* (2007) 150 Cal.App.4th
11 1511 and cases cited therein.)

12 "The evidence must substantiate the ultimate conclusion that the
13 prisoner's release currently poses an unreasonable risk of danger to
14 the public. It violates a prisoner's right to due process when the
15 Board or Governor attaches significance to evidence that forewarns no
16 danger to the public." (*In re Tripp* (2007) 150 Cal.App.4th 306,
17 313.)

18 The Board "cannot rely on the fact that the killing could have
19 been avoided to show the killing was especially brutal." (*In re*
20 *Cooper* (2007) 153 Cal.App.4th 1043, 1064.)

21 The Board's focus must be upon how the inmate "actually
22 committed his crimes" not the "incorporeal realm of legal
23 constructs." (*Lee, supra*, 143 Cal.App.4th at p. 1413.) This is
24 especially significant when the murder conviction is based on the
25 felony murder rule, provocative act doctrine, or accomplice liability
26 such that the inmate did not intend to kill or may not have even been
27 gang rivalries, posturing, and threats which mature adults would not have been
28

1 the actual killer.

2 The Board has ample guidance before it in the decisions of the
3 various reviewing courts to constrain its abuse, but has failed to
4 avail itself of the opportunity to do so.

6 SEPARATION OF POWERS DOCTRINE

7 The evidence presented, as discussed above, has established a
8 void for vagueness "as applied" due process violation. That same
9 evidence also proves a separate but related Constitutional violation
10 -- an as applied separation of powers violation.

11 The separation of powers doctrine provides "that the legislative
12 power is the power to enact statutes, the executive power is the
13 power to execute or enforce statutes, and the judicial power is the
14 power to interpret statutes and to determine their
15 constitutionality."... (*Lockyer v. City and County of San Francisco*
16 (2004) 33 Cal.4th 1055, 1068.) Because the evidence has proven the
17 Board is not executing/enforcing the legislature's statutes as
18 intended it is this Court's duty to intervene. The question here is
19 whether the Board is violating the separation of powers doctrine by
20 appropriating to itself absolute power over parole matters and
21 disregarding the limits and guidelines placed by the statute.⁶

22 "Government Code section 11342.2 provides: 'Whenever by the

23
24 caught up in.

25 ⁶ "It is settled that Administrative regulations that violate acts of the
26 Legislature are void and no protestations that they are merely an exercise of
27 administrative discretion can sanctify them. They must conform to the legislative
28 will if we are to preserve an orderly system of government. Nor is the motivation
of the agency relevant: It is fundamental that an administrative agency may not
usurp the legislative function, no matter how altruistic its motives are."
(*Agricultural Labor Relations Board v. Superior Court of Tulare County* (1976) 16
Cal.3d 392, 419 quoting *Morris v. Williams* (1967) 67 Cal.2d 733, 737, and *City of*
San Joaquin v. State Bd. of Equalization (1970) 9 Cal.App.3d 365, 374.)

1 express or implied terms of any statute a state agency has authority
2 to adopt regulations to implement, interpret, make specific or
3 otherwise carry out the provisions of the statute, no regulation
4 adopted is valid or effective unless consistent and not in conflict
5 with the statute and reasonably necessary to effectuate the purpose
6 of the statute.' Administrative regulations that alter or amend the
7 statute or enlarge or impair its scope are void and courts not only
8 may, but it is their obligation to strike down such regulations."

9 (*Pulaski v. Occupational Safety & Health Stds. Bd.* (1999) 75
10 Cal.App.4th 1315, 1341, citations omitted.)

11 The vice of overbroad and vague regulations such as are at issue
12 here is that they can be manipulated, or 'interpreted,' by executive
13 agencies as a source of unfettered discretion to apply the law
14 without regard to the intent of the people as expressed by the
15 legislature's enabling statutes. In short, agencies usurp unlimited
16 authority from vague regulations and become super-legislatures that
17 are unaccountable to the people. As it has sometimes been framed and
18 addressed in the case law, a vague or all encompassing standard runs
19 the risk of "violat[ing] the separation of powers doctrine by
20 'transforming every [executive decisionmaker] into a "mini-
21 legislature" with the power to determine on an ad hoc basis what
22 types of behavior [satisfy their jurisdiction].'" (*People v. Ellison*
23 (1998) 68 Cal.App.4th 203, 211, quoting *People v. Superior Court*
24 (*Caswell*) (1988) 46 Cal.3d 381, 402.)

25 "It is concern about 'encroachment and aggrandizement,' the
26 [United States Supreme Court] reiterated, that has animated its
27 separation of powers jurisprudence. 'Accordingly, we have not
28

1 | hesitated to strike down provisions of law that either accrete to a
2 | single Branch powers more appropriately diffused among separate
3 | Branches or that undermine the authority and independence of one or
4 | another coordinate Branch.'" (*Kasler v. Lockyer* (2000) 23 Cal.4th
5 | 472, 493, quoting *Mistretta v. United States* (1989) 488 U.S. 361,
6 | 382.) This articulation of the principle speaks directly to the
7 | situation at hand. The Board, by its enactment and interpretation of
8 | Title 15, §2402, has appropriated to itself absolute power over
9 | 'lifer' matters. Overreaching beyond the letter and spirit of the
10 | Penal Code provisions, Title 15, §2402(c)(1) has been interpreted by
11 | the Board to supply the power to declare every crime enough to deny
12 | parole forever. The fact that Title 15, §2402, has been invoked in
13 | every case, but then sometime later not invoked, tends to show either
14 | completely arbitrary and capricious behavior or that unwritten
15 | standards are what really determine outcomes. In either event, all
16 | pretenses of taking guidance from, or being limited by, the
17 | legislature's statutes have been abandoned. "[I]t is an elementary
18 | proposition that statutes control administrative interpretations."
19 | (*Ohio Casualty Ins. Co. v. Garamendi* (2006) 137 Cal.App.4th 64, 78.)
20 | Title 15 §2402 as applied, however, has no controls or limitations.

21 | The PC § 3041(b) exception to the rule can only be invoked when
22 | the "gravity of the current convicted offense or offenses, or the
23 | timing and gravity of current or past convicted offense or offenses,
24 | is such that consideration of the public safety requires a more
25 | lengthy period of incarceration for this individual." The word
26 | "gravity" is a directive for comparison just as "more lengthy"
27 | indicates a deviation from the norm. While *Dannenberg* held there
28 |

1 does not need to be intra case comparison for the purposes of term
2 uniformity or proportionality, there necessarily has to be some sort
3 of comparison for the purposes of adhering to the legislative mandate
4 that parole is available. The Board employs no meaningful yardstick
5 in measuring parole suitability. This is a violation of the
6 separation of powers doctrine. (*People v. Wright* (1982) 30 Cal.3d
7 705, 712-713. And see *Terhune v. Superior Court* (1998) 65
8 Cal.App.4th 864, 872-873. Compare *Whitman v. Am. Trucking Ass'ns*
9 (2001) 531 U.S. 457, 472, describing a delegation challenge as
10 existing when the legislature fails to lay down "an intelligible
11 principle to which the person or body authorized to act is directed
12 to conform.")

14 RESPONDENT'S POSITION

15 The Attorney General has suggested, without pointing to any
16 concrete examples, that it is possible that the Board, when invoking
17 the crime as a reason to deny parole, is not placing it within
18 §2402(c)(1) but instead using it as some sort of 'lesser factor'
19 which, only when combined with other unsuitability criteria, can
20 contribute to a valid parole denial. The two problems with this
21 position are, first, there is no evidentiary support for this
22 assertion, and second, it would have no impact on the constitutional
23 infirmities outlined and proven above.

24 Even if Respondent had produced evidence that the Board was
25 utilizing the crime as a 'lesser factor' which needs others to fully
26 support a parole denial, the Board would then be admitting it was
27 denying parole, in part, for the very reason that the person is
28

1 before the panel and eligible for parole in the first place - the
2 commitment offense. Respondent's argument suggests that a crime that
3 only qualified as the *Dannenberg* "minimum necessary" could still be
4 invoked as a reason for denying parole. Respondent argues that when
5 the crime is invoked 'not in the *Dannenberg* sense,' there must be
6 other reasons for the parole denial and the crime alone would not be
7 enough in this context. This position is inconsistent with the law
8 and fundamental logic.

9 A crime qualifies under *Dannenberg* when it is "particularly
10 egregious," or one where "no circumstances of the offense reasonably
11 could be considered more aggravated or violent than the minimum
12 necessary to sustain a conviction for that offense." (*Dannenberg*,
13 *supra*, 34 Cal.4th at pp. 1094-1095.) These are the only two choices.

14 If a crime consists of only the bare elements then it is not
15 aggravated and it cannot, in and of itself, serve as a basis for
16 parole denials once the inmate becomes eligible for parole. It is
17 the reason an inmate may be incarcerated initially for the equivalent
18 of 15 or 25 years, and then examined to determination rehabilitation
19 efforts when they come before the Board, but a crime that is no more
20 than the bare minimum cannot be factored into the equation pursuant
21 to PC § 3041(b) or any of the case law interpreting it.

22 In oral argument Respondent suggested a second way the
23 commitment offense can be used outside of §2402(c)(1). If for
24 example a crime had its roots in gang allegiances or rivalries and
25 the inmate continued to associate with gangs while incarcerated, then
26 an aspect of the crime, even if the crime otherwise consisted of no
27 more than the minimum elements, could be combined with other behavior

1 to support a parole denial. Similarly, if a crime was rooted in an
2 inmate's then existing drug addiction, and the Board was to point to
3 a recent 115 involving drugs, the evidence that the inmate's drug
4 issues had not been resolved would justify a parole denial even if
5 the crime itself was not aggravated. A finding that the inmate is
6 not suitable for release under these circumstances, however, is not
7 based on the facts of the commitment offense as tending to show
8 unsuitability. It is based on the conclusion that can be drawn about
9 Petitioner's lack of rehabilitation or change since the offense, and
10 thus, his present dangerousness.

11 Respondent has not demonstrated any flaws in Petitioner's
12 methodology or analysis, nor provided any actual evidence of the
13 crime being invoked other than pursuant to §2402(c)(1). Drawing
14 conclusions from the Board's direct statements, or its precise
15 recitations of the §2402(c)(1) language, logically indicates an
16 invocation of §2402(c)(1), and Respondent's suggestion otherwise is
17 insupportable.

18 19 THE QUESTION OF BIAS

20 Because the issue has been squarely presented, and strenuously
21 argued by Petitioners, this Court is obligated to rule on the charge
22 that the Board's actions prove an overriding bias and deliberate
23 corruption of their lawful duties.

24 In the discrimination and bias case of *USPS Bd. of Governors v.*
25 *Aikens* (1983) 460 U.S. 711, the United States Supreme Court
26 acknowledged "there will seldom be 'eyewitness' testimony as to the
27 [] mental processes" of the allegedly biased decisionmaker. Instead,

1 an examination of other cases for trends or patterns can provide the
 2 necessary circumstantial evidence. (See *Aikens*, *supra*, at footnote
 3 2.) Reaffirming that such circumstantial evidence will be sufficient
 4 the Court stated: "The law often obliges finders of fact to inquire
 5 into a person's state of mind. As Lord Justice Bowen said in
 6 treating this problem in an action for misrepresentation nearly a
 7 century ago, 'The state of a man's mind is as much a fact as the
 8 state of his digestion. It is true that it is very difficult to
 9 prove what the state of a man's mind at a particular time is, but if
 10 it can be ascertained it is as much a fact as anything else.'"
 11 (*Aikens*, at pp. 716-717, quoting *Edgington v. Fitzmaurice* (1885) 29
 12 Ch. Div. 459, 483.)⁷

13 The discovery in these cases was granted in part due to the
 14 Petitioners' prima facie showing of bias and the necessity that it be
 15 "adequately supported with evidence" if such evidence is available.
 16 (*Ramirez*, *supra*, 94 Cal.App.4th at p. 564, fn. 5. See also *Nasha v.*
 17 *City of Los Angeles* (2004) 125 Cal.App.4th 470, 483: "A party seeking
 18 to show bias or prejudice on the part of an administrative decision
 19 maker is required to prove the same 'with concrete facts.'" And see
 20 *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674,
 21 841: "The challenge to the fairness of the adjudicator must set forth
 22 concrete facts demonstrating bias or prejudice." See also *Hobson v.*

23
 24 ⁷ As occurred in *Aikens*, *supra*, and as suggested in prior orders of this Court,
 25 Respondent should have provided direct evidence from the decisionmakers. While the
 26 fact that a Defendant does not explain his or her actions cannot be held against
 27 him, (*Griffin v. California* (1965) 380 U.S. 609, *Doyle v. Ohio* (1976) 426 U.S.
 28 610,) it is appropriate to give some weight to the consideration that the Board has
 failed to offer any direct evidence or explanation on its own behalf. While the
 case of *Hornung v. Superior Court* (2000) 81 Cal.App.4th 1095 stands for the
 proposition that Petitioner may not inquire into the Board members mental
 processes, Respondent is not precluded from offering such direct evidence if they
 were able to testify as to their good faith and conscientious efforts.

1 Hansen (1967) 269 F.Supp. 401, 502, the watershed Washington D.C.
2 school desegregation case in which the court determined from a
3 statistical and factual analysis that racial bias was influencing
4 policy.)

5 In the case of *People v. Adams* (2004) 115 Cal.App.4th 243, 255,
6 a similar claim of biased decision making was asserted and it was
7 rejected because, although the defendant clearly articulated it, "he
8 has not demonstrated it. Therefore, he has failed to bear his burden
9 of showing a constitutional violation as a demonstrable reality, not
10 mere speculation." In the present cases Petitioners have provided
11 overwhelming concrete evidence. It is difficult to believe that the
12 Board's universal application of §2402(c)(1) has been an inadvertent
13 mistake or oversight on their part. It is hard to credit the Board's
14 position that it does not know its own patterns and practices reveal
15 a complete lack of standards or constraints on their power.
16 Respondent's protestations ring hollow, and it seems a statistical
17 impossibility, that the Board's use of "detailed" criteria in such a
18 fashion that they are rendered meaningless is a result of good faith
19 efforts on their part. That every murder is "especially heinous,
20 atrocious or cruel," and can therefore be an exception to the rule
21 that a parole date should be set, does not seem to be an accident on
22 their part.

23 Although no court has thus far agreed with the accusation that
24 the Board approaches its duties with a predetermination and a bias,
25 no court has previously been presented the comprehensive evidence
26 outlined herein. While this Court does not turn a blind eye to the
27 reasonable conclusion that the Board's unconstitutional practices are
28

1 willful, there is another possibility. The pattern of errors
2 demonstrated by the discovery in this case, and the continuously
3 growing body of Court of Appeal opinions finding consistent and
4 persistent abuse of discretion, may instead be caused by the fact
5 that the Board is simply overworked and substantively untrained. The
6 impossibility of the blanket applicability of §2402(c)(1) may be only
7 the result of sloppy preparation and inadvertent carelessness.

8 The Board must first be given an opportunity to comply with the
9 necessary remedy provided by this court before it is possible to
10 enter a finding of conscious bias and illegal sub rosa policy. To do
11 otherwise would ignore the complexities and magnitude of the largely
12 discretionary duties with which that Board is vested.

13 14 CONCLUSION

15 The conclusive nature of the proof in this case, and the
16 suggestion of institutional bias do not preclude formulation of an
17 remedy which will guarantee adequate restrictions on, and guidance
18 for, the Board's exercise of discretion in making parole suitability
19 determinations. The Board can be made to lawfully perform its duties
20 if given explicit instructions.

21 As noted supra, a reason the proof in this case irrefutably
22 establishes constitutional violations is because the Board does not,
23 in actual fact, operate within the limiting construction of the
24 regulations. The Board's expansive interpretation allows it to
25 operate without any true standards. Although numerous rulings of
26 both state and federal courts of appeal have invalidated the Board's
27 application of the §2402(c) criteria to particular facts, the Board

1 does not take guidance from these binding precedents and ignores them
2 for all other purposes. In the most recent of these cases, *In re*
3 *Roderick*, (2007) ___ Cal.App.4th ___ (A113370) the First District
4 held four of five §2402 factors "found" by the Board to be
5 unsupported by any evidence. At footnote 14 the court took the time
6 to criticize the Board for its repeated use of a "stock phrase"
7 "generically across the state." The court also clarified that "at
8 minimum, the Board is responsible for articulating the grounds for
9 its findings and for citing to evidence supporting those grounds."

10 There is nothing in the evidence presented that would allow any
11 conclusion but that, without intervention of the Courts, the Board
12 will ignore the lessons of these rulings in the future and continue
13 to employ its formulaic approach of citing a criteria from
14 §2402(c)(1), repeating the facts of the crime, but never
15 demonstrating a logical connection between the two. This is the
16 core problem with the Board's methodology -- they provide no
17 explanation or rationale for the findings regarding the crime itself.

18 This practice results in violence to the requirements of due
19 process and individualized consideration which are paramount to the
20 appropriate exercise of its broad discretion.

21 The only solution is one that compels the Board to identify the
22 logical connection between the facts upon which it relies and the
23 specific criteria found to apply in the individual case. For
24 example, the Board often finds that an inmate's motive is "trivial"
25 without ever suggesting why, on these facts, that motive is not just
26 as trivial as the motive behind any other murder. What motive is not
27 trivial? By any definition "trivial" is a word of comparison and
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1 only has meaning when there can be examples that are not "trivial."

2 Similarly, although the Sixth District made it plain four years
3 ago that "all [] murders by definition involve some callousness," (In
4 re Smith (2003) 114 Cal.App.4th 343, 345,) the Board has continued to
5 deny countless paroles labeling the crime "callous" without ever
6 suggesting what crime would not qualify as "callous" and without
7 consistently explaining why the individual case before it
8 demonstrates "exceptional" callousness.

9 Respondent has consistently refused to suggest what possible
10 instances of murder would not fit the Board's amorphous application
11 of the §2402 criteria. Citing *Dannenberg*, Respondent insists such
12 comparative analysis is unnecessary. Respondent fundamentally
13 misunderstands the *Dannenberg* holding.

14 The PC § 3041(b) exception to the rule can only be invoked when
15 the "gravity of the current convicted offense or offenses, or the
16 timing and gravity of current or past convicted offense or offenses,
17 is such that consideration of the public safety requires a more
18 lengthy period of incarceration for this individual." The word
19 "gravity" is a directive for comparison just as "more lengthy"
20 indicates a deviation from the norm. While *Dannenberg* held there
21 does not need to be intra case comparison for the purposes of term
22 uniformity or proportionality, there necessarily has to be some sort
23 of comparison for the purposes of adhering to the legislative mandate
24 that parole is available. This is implicit in §2402 because the
25 qualifier "especially," in "especially heinous atrocious or cruel,"
26 requires that some form of comparison be made. While the original
27 drafters of §2402 seemed to have recognized this fact, the ongoing
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1 conduct of the Board has completely ignored it, and this is the
2 essence of the due process violation Petitioners have asserted.

3 As noted in his dissent in the recent case of *In re Roderick*,
4 *supra*, Justice Sepulveda would have deferred to the Board's
5 'exercise' of discretion because "Board members have both training
6 and vast experience in this field. They conduct literally thousands
7 of parole suitability hearings each year. The Board therefore has
8 the opportunity to evaluate the egregiousness of the facts of a great
9 number of commitment offenses. ... The Board's training and
10 experience in evaluating these circumstances far exceeds that of
11 most, if not all, judges." The evidence in this case, however,
12 suggests a flaw in granting such deference. Since the Board
13 continues to place every murder in the category of offenses "tending
14 to show unsuitability," something is certainly wrong. Since the
15 Board's vast experience is undeniable, the problem must be in the
16 Board's training and understanding of the distinguishing features of
17 the guidelines and criteria. Although Justice Sepulveda presumes
18 that Board members receive substantive training, there is no evidence
19 before this court to suggest that it does, and substantial
20 circumstantial evidence to suggest that it does not.

21 In the vast numbers of Santa Clara County cases reviewed by this
22 Court, the Board's formulaic decisions regarding the commitment
23 offense do not contain any explanation or thoughtful reasoning.
24 Instead, the Board's conclusionary invocation of words from
25 §2402(c)(1) is linked to a repetition of the facts from the Board
26 report by the stock phrase: "These conclusions are drawn from the
27 statement of facts wherein ..." Thereafter the inmate files a habeas
28

1 corpus petition and Respondent, after requesting an extension of
2 time, files a boilerplate reply asserting the Board's power is
3 "great" and "almost unlimited" and thus any "modicum" of evidence
4 suffices. Respondent does not cite or distinguish the expanding body
5 of case law that is often directly on point as to specific findings
6 made. Thereafter, if the writ is granted, the Board is directed to
7 conduct a new hearing "in compliance with due process" and that order
8 is appealed by Respondent. On appeal the order is usually upheld
9 with modifications and in the end, after countless hours of attorney
10 and judicial time, the Board conducts a new two hour hearing at which
11 they abuse their discretion and violate due process in some different
12 way.

13 This system is malfunctioning and must be repaired. The
14 solution must begin with the source of the problem. The Board must
15 make efforts to comply with due process in the first instance. The
16 case law published over the last five years provides ample and
17 sufficient guidelines and must be followed. Although the Board
18 methods suggest it believes this to be optional, it is not.

19 20 THE REMEDY

21 Thus, it is the order of this Court that the Board develop,
22 submit for approval, and then institute a training policy for its
23 members based on the current and expanding body of published state,
24 and federal, case law reviewing parole suitability decisions, and
25 specifically the application of §2402 criteria. In addition to
26 developing guidelines and further criteria for the substantive
27 application of §2402 the Board must develop rules, policies and
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1 procedures to ensure that the substantive guidelines are followed.

2 This Court finds its authority to impose this remedy to flow
3 from the fundamental principles of judicial review announced over two
4 centuries ago in *Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137.
5 Citing that landmark case, the California Supreme Court has
6 recognized "Under time-honored principles of the common law, these
7 incidents of the parole applicant's right to 'due consideration'
8 cannot exist in any practical sense unless there also exists a remedy
9 against their abrogation." (*In re Sturm* (1974) 11 Cal.3d 258, 268.)

10 In *Sturm* the court directed that the Board modify its rules and
11 procedures so that thereafter "The Authority will be required [,]
12 commencing with the finality of this opinion, to support all its
13 denials of parole with a written, definitive statement of its reasons
14 therefor and to communicate such statement to the inmate concerned."
15 (*Sturm* at p. 273.)

16 Similarly, in the case of *Minnis, supra*, the California Supreme
17 Court held the Board's policy of categorically denying parole to drug
18 dealers was illegal. Based on its analysis the court there was
19 clearly prepared to order that Board to modify its rules and
20 procedures however such was unnecessary because the Board
21 "voluntarily rescinded" the illegal policy. While the remedy in this
22 case is of greater scope than that necessary in either *Sturm* or
23 *Minnis, supra*, so too has been the showing of a systematic abuse of
24 discretion and distortion of process.

25 The most recent case to address the court's roles and duties in
26 overseeing the parole suitability process has been *In re Rosenkrantz*,
27 *supra*, 29 Cal.4th 616. In that case the court explained that
28

1 judicial review of a Governor's parole determination comports with,
2 and indeed furthers, separation of powers principles because the
3 courts are not exercising "complete power" over the executive branch
4 and do not "defeat or materially impair" the appropriate exercise or
5 scope of executive duties. (Rosenkrantz at p. 662.) Citing Strum,
6 *supra*, the court reaffirmed that a life term inmate's "due process
7 rights cannot exist in any practical sense without a remedy against
8 its abrogation." (Rosenkrantz at p. 664.)

9 The Rosenkrantz court also put forth what it believed was an
10 extreme example but which, unfortunately, has been shown to exist in
11 this case. The court stated: "In the present context, for example,
12 judicial review could prevent a Governor from usurping the
13 legislative power, in the event a Governor failed to observe the
14 constitutionally specified limitations upon the parole review
15 authority imposed by the voters and the Legislature." This is
16 exactly what the evidence in this case has proven. As noted above
17 the Board has arrogated to itself absolute authority, despite
18 legislative limitations and presumptions, through the mechanism of a
19 vague and all inclusive, and thus truly meaningless, application of
20 standards. The remedy this Court is imposing is narrowly tailored to
21 redress this constitutional violation.

22 The consequence of the Board's actions (of giving § 2402(c)(1)
23 such a broadly all encompassing and universal application) is that
24 they have unwittingly invalidated the basis of the California Supreme
25 Court's holding in *Dannenberg*. The reason the four justice majority
26 in *Dannenberg* upheld the Board's standard operating procedures in the
27 face of the Court of Appeal and dissent position is because "the
28

1 Board must apply detailed standards when evaluating whether an
2 individual inmate is unsuitable for parole on public safety grounds."
3 (*Dannenberg* at p. 1096, footnote 16. See also page 1080: "the
4 regulations do set detailed standards and criteria for determining
5 whether a murderer with an indeterminate life sentence is suitable
6 for parole.") However, Petitioners in these cases have proven that
7 there are no "detailed standards" at all. Instead the Board has
8 systematically reduced the "detailed standards" to empty words. The
9 remedy this Court orders, that there truly be "detailed standards,"
10 requires the promulgation of further rules and procedures to
11 constrain and guide the Board's powers. This remedy differs in
12 specifics, but not in kind, from what courts have previously imposed
13 and have always had the power to impose.

14 The Board must fashion a training program and further rules,
15 standards and regulations based on the opinions and decisions of the
16 state and federal court cases which provide a limiting construction
17 to the criteria which are applied.⁸ The Board must also make
18 provisions for the continuing education of its commissioners as new
19 case law is published and becomes binding authority. This Court will
20 not, at this point, outline the requirements and lessons to be taken
21 from the above cases. It is the Board's duty, in the first instance
22 to undertake this task. The training program, and associated rules
23 and regulations, shall be served and submitted to this Court, in

24 ⁸While the showing and analysis in this case was limited to § 2402(c)(1), the
25 conclusions that the evidence compelled, that the Board has been carelessly
26 distorting and misapplying the regulations, is not so limited. Accordingly, the
27 training program that is necessary for the Board can not reasonably be limited to
28 just § 2402(c)(1). Thus, to the extent case law recognizes, clarifies and
establishes remedies for other due process violations they must also be
incorporated into the necessary rules and training the Board is required to abide
by.

1 writing, within 90 days. Counsel for Petitioners, and any other
2 interested parties, may submit briefs or comments within 30 days
3 thereafter. After receipt and review of the materials this Court
4 will finalize the training program, and associated rules, and the
5 Petitioners in these cases shall receive a new hearing before a Board
6 that does not operate with the unfettered discretion and caprice
7 demonstrated by the evidence here presented.

8 ORDER

9 For the above reasons the habeas corpus petition is granted and
10 it is hereby ordered that Petitioner be provide a new hearing which
11 shall comply with due process as outlined above. Respondent shall
12 provide weekly updates to this Court on the progress of its
13 development of the new rules and regulations outlined above.

14
15
16
17 DATED: Aug 30, 2007

Linda R. Condrón
LINDA R. CONDRON
JUDGE OF THE SUPERIOR COURT

18
19
20 cc: Petitioner's Attorney (Jacob Burland)
21 Attorney General (Denise Yates, Scott Mather)
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EXHIBIT "F"

bd

United States District Court
for the
Eastern District of California
December 22, 2004

* * CERTIFICATE OF SERVICE * *

2:96-cv-00783

Coleman

v.

Board of Prison Term

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on December 22, 2004, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

Tami M Warwick	TM/PAN
Attorney General's Office for the State of California	
PO Box 944255	AR/LKK
1300 I Street	
Suite 125	
Sacramento, CA 94244-2550	

Ann Catherine McClintock
Federal Defender
801 I Street
Third Floor
Sacramento, CA 95814

Jack L. Wagner, Clerk

BY: 
Deputy Clerk

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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 MELVYN COLEMAN,

11 Petitioner,

No. CIV S-96-0783 LKK PAN P

12 vs.

13 BOARD OF PRISON TERMS, et al.,

14 Respondent.

ORDER

15 _____ /
16 Petitioner, a state prisoner proceeding pro se, has filed this application for a writ
17 of habeas corpus. The matter was referred to a United States Magistrate Judge pursuant to 28
18 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

19 On December 22, 2004, the magistrate judge filed findings and recommendations
20 herein which were served on all parties and which contained notice to all parties that any
21 objections to the findings and recommendations were to be filed within twenty days. Respondent
22 has filed objections to the findings and recommendations.

23 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-
24 304, this court has conducted a de novo review of this case. Having carefully reviewed the
25 entire file, the court finds the findings and recommendations to be supported by the record and by
26 proper analysis.

1 Accordingly, IT IS HEREBY ORDERED that:

2 1. The findings and recommendations filed December 22, 2004, are adopted in
3 full; and

4 2. The petition for habeas corpus will be granted unless, within 60 days,
5 respondent provides a fair parole suitability hearing, conducted by a board free of any prejudice
6 stemming from a gubernatorial policy against parole for murderers.

7 DATED: May 19, 2005.

8 /s/Lawrence K. Karlton
9 LAWRENCE K. KARLTON
10 SENIOR JUDGE
11 UNITED STATES DISTRICT COURT
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FILED

DEC 22 2004

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

United States District Court
Eastern District of California

Melvyn H. Coleman, No. Civ. S-96-0783 LKK PAN P
Petitioner, Findings and Recommendations
vs.

Board of Prison Terms, et al.,
Respondents.

-oOo-

Petitioner seeks a writ of habeas corpus.

In his November 14, 1997, second amended petition petitioner claims his federal due process guarantee was violated because the California Board of Prison Terms (Board) has failed to conduct a fair parole suitability hearing.

In 1974 petitioner was convicted of first degree murder, attempted murder, first degree robbery, first degree burglary and other charges. The victims, Mr. And Mrs. Siewart, returned to their home while petitioner was burglarizing it; he then

1 approached before they got out of their car and robbed and shot
2 them, killing Mr. Siewart and seriously wounding Mrs. Siewart.
3 Petitioner had a prior juvenile record.

4 Under California law, a prisoner including a convicted
5 murderer serving an indeterminate term (i.e., seven years to
6 life) is entitled to a hearing before a panel composed of members
7 of the Board to determine his suitability for parole. By
8 statute, parole at some point normally is appropriate and the
9 Board "shall set a release date unless it determines that the
10 gravity of the current convicted offense or offenses, or the
11 timing and gravity of current or past convicted offense or
12 offenses, is such that consideration of the public safety
13 requires a more lengthy period of incarceration. . . ." Cal.
14 Penal Code § 3041(b). Procedures governing suitability hearings
15 are set forth in Penal Code § 3041.5 (providing prisoners with
16 notice and an opportunity to be heard and requiring a written
17 statement of reasons if the panel refuses to set a parole date).
18 Regulations prescribe factors for the panel to consider in
19 determining whether each prisoner is suitable or unsuitable for
20 parole. 15 CAC § 2281.¹

21
22 ¹ Factors supporting a finding of unsuitability include: (1) whether the
23 prisoner's offense for which he is confined was committed in an "especially
24 heinous, atrocious or cruel manner"; (2) the prisoner's record of violence prior
25 to the offense; (3) whether the prisoner has an unstable social history; (4)
26 whether the prisoner has committed sadistic sexual offenses; (5) whether the
prisoner has a lengthy history of severe mental problems related to the offense;
and (6) whether the prisoner has engaged in serious misconduct in prison or jail.
Factors supporting a finding of suitability include: (1) whether the prisoner has
a juvenile record; (2) whether the prisoner has experienced reasonably stable
relationships with others; (3) whether the prisoner shows signs of remorse; (4)

1 Petitioner presents evidence that under Governors Wilson and
2 Davis the Board disregarded regulations ensuring fair suitability
3 hearings and instead operated under a sub rosa policy that all
4 murderers be found unsuitable for parole. The record shows that
5 between 1992 and 1998 less than one percent of the prisoners in
6 this group were released on parole. During the previous period
7 the parole rate had been about four percent. Petitioner presents
8 sworn testimony that the policy was enforced by (1) appointing
9 Board members less likely to grant parole and more willing to
10 disregard their statutory duty; (2) removing Board members more
11 likely to grant parole; (3) reviewing decisions finding a
12 prisoner suitable and setting a new hearing before a different
13 panel; (4) scheduling rescission hearings for prisoners who had
14 been granted a parole date; (5) re-hearing favorable rescission
15 proceedings and hand-picking panels to ensure the desired
16 outcome; (6) panel members agreeing upon an outcome in advance of
17 the hearing; and (7) gubernatorial reversal of favorable parole
18 decisions. See e.g., declaration of former BPT Commissioner
19 Albert Leddy (Leddy) paras. 5, 6, 8-17, 20 (attached as Ex. 17 to
20 petitioner's March 27, 2003, motion for discovery); deposition of
21 Leddy taken in In re Fortin, et al., San Diego Superior Court

22 _____
23 whether the prisoner committed his crime as the result of significant stress in
24 his life; (5) whether the prisoner suffered from Battered Woman Syndrome when she
25 committed the crime; (6) whether the prisoner lacks any significant history of
26 violent crime; (7) whether the prisoner's present age reduces the probability of
recidivism; (8) whether the prisoner has made realistic plans for release or has
developed marketable skills that can be put to use on release; and (9) whether
the prisoner's institutional activities indicate an enhanced ability to function
within the law upon release. 15 CAC § 2281.

1 case number HSC10279 at 18-19, 47-50, 56-59, 61-63, 65-66, 88-89,
2 95, 97-99, 102, 106, 110, 118 & 126 (attached as Ex. 10 to
3 petitioner's March 27, 2003, motion for discovery); deposition of
4 former BPT Commissioner Edmund Tong taken in Kimble v. Cal. BPT,
5 C.D. Cal. case number CV 97-2752 at 42-43, 45-47, 71, 73, 80-82,
6 85-86, 96, 103, 105, 107 & 109 (lodged December 30, 2003).²

7 The unrefuted record shows the no-parole-for-murderers
8 policy existed and continued under Governor Davis. In In re
9 Rosencrantz, the California Supreme Court took note of evidence
10 presented in the state trial court establishing that the Board
11 held 4800 parole suitability hearings between January 1999
12 through April 2001, granting parole to 48 murderers (one
13 percent). 29 Cal. 4th 616, 685 (2003). Of those 48, the
14 governor reversed 47 of the Board's decisions and only one
15 murderer out of 4800 actually was released on parole. Id.
16 Petitioner in Rosenkrantz also submitted evidence of the
17 following interview of Governor Davis reflected in the April 9,
18 1999, edition of the Los Angeles Times: " . . . [T]he governor
19 was adamant that he believes murderers - even those with second-
20 degree convictions - should serve at least a life sentence in
21 prison. [Para.] Asked whether extenuating circumstances should

22
23 ² Meanwhile, the annual cost to taxpayers of conducting these "pro forma"
24 hearings is enormous, amounting to millions of dollars per year. See Exhibit 7
25 to petitioner's March 27, 2003, motion for discovery (California Legislative
26 Analyst's Office - Analysis of the 2000-01 Budget Bill for the Board of Prison
Terms criticizing proposed \$19 million annual budget and noting huge cost of
additional incarceration resulting from no-parole policy).

1 be a factor in murder sentences, the governor was blunt: "No.
2 Zero . . . They must not have been listening when I was
3 campaigning. . . . If you take someone else's life, forget it.
4 I just think people dismiss what I said in the campaign as either
5 political hyperbole or something that I would back away from . .
6 . . We are doing exactly what we said we were going to do.""
7 29 Cal. 4th at 684.

8 Respondent does not refute the alleged facts. Instead,
9 respondent argues that, assuming arguendo prisoners in California
10 have an interest in a parole date protected by the due process
11 clause, constitutional requirements are met so long as there is
12 "some evidence" supporting the findings petitioner is unsuitable.
13 See Oppo. at 7:20 (so long as "some evidence" standard is met,
14 "the Board decisions could not have been arbitrary.") For the
15 reasons explained, this court rejects that claim. As this court
16 previously has found, there always will be "some evidence" that
17 can be used to explain a denial or rescission under the
18 circumstances. Federal due process requires more.

19 California's parole scheme gives rise to a protected liberty
20 interest in release on parole. McQuillion v. Duncan, 306 F.3d
21 895, 902 (2002); Jancsek v. Oregon Bd. of Parole, 833 F.2d 1389,
22 1390 (9th Cir. 1987); Greenholtz v. Inmates of Nebraska Penal &
23 Correctional Complex, 442 U.S. 1 (1979); Biggs v. Terhune, 334
24
25
26

1 F.3d 910, 915 (9th Cir. 2003); In re Rosenkrantz, 29 Cal. 4th 616
2 (2003).³

3 Therefore, petitioner is entitled to the process outlined in
4 Greenholtz, viz., notice, opportunity to be heard, a statement of
5 reasons for decision, and limited right to call and cross-examine
6 witnesses. The determination that petitioner is unsuitable for
7 parole must be supported by some evidence bearing some indicia of
8 reliability.

9 These guarantees do not exhaust petitioner's right to due
10 process. The fundamental core of due process is protection
11 against arbitrary action:

12 The principal and true meaning of the phrase has never
13 been more tersely or accurately stated than by Mr.
14 Justice Johnson, in Bank of Columbia v. Okely, 17 U.S.
15 235, 4 Wheat. 235-244, 4 L.Ed. 449 [(1819)]: "As to the
16 words from Magna Charta, incorporated into the
17 Constitution of Maryland, after volumes spoken and
18 written with a view to their exposition, the good sense
19 of mankind has at last settled down to this: that they
20 were intended to secure the individual from the
21 arbitrary exercise of the powers of government,
22 unrestrained by the established principles of private
23 right and distributive justice."

18 Hurtado v. California, 110 U.S. 516, 527, (1884). "The
19 concessions of Magna Charta were wrung from the king as
20 guaranties against the oppressions and usurpations of his
21

22
23 ³ That is so because the parole statute, Penal Code § 3041, uses mandatory
24 language ("The panel or board shall set a release date unless it determines"
25 further incarceration is necessary in the interest of public safety) which
26 "creates a presumption that parole release will be granted," unless the
statutorily defined determinations are made. Board of Pardons v. Allen, 482 U.S.
369, 378 (1987) (quoting Greenholtz, 442 U.S. at 12). As of 1988, by amendment
of the state constitution, a parole date given can be withdrawn by the Governor
under the same factors considered by the Board.

1 prerogative." Id. at 531. "The touchstone of due process is
2 protection of the individual against arbitrary action of
3 government." Wolff v. McDonnell, 418 U.S. 539, 558 (1974),
4 citing Dent v. West Virginia, 129 U.S. 114 (1889).

5 A government official's arbitrary and capricious exercise of
6 his authority violates the essence of due process, contrary to
7 centuries of Anglo-American jurisprudence. See Yick Wo v.
8 Hopkins, 118 U.S. 356, 369 (1886) ("When we consider the nature
9 and the theory of our institutions of government, the principles
10 upon which they are supposed to rest, and review the history of
11 their development, we are constrained to conclude that they do
12 not mean to leave room for the play and action of purely personal
13 and arbitrary power."); United States v. Lee, 106 U.S. 196, 220
14 (1882) ("No man in this country is so high that he is above the
15 law. No officer of the law may set that law at defiance with
16 impunity. All the officers of the government from the highest to
17 the lowest, are creatures of the law and are bound to obey it.
18 It is the only supreme power in our system of government, and
19 every man who by accepting office participates in its functions
20 is only the more strongly bound to submit to that supremacy, and
21 to observe the limitations which it imposes upon the exercise of
22 the authority which it gives."); U.S. v. Nixon, 418 U.S. 683,
23 695-96 (1974) (rule of law is "historic commitment"); Accardi v.
24 O'Shaughnessy, 347 U.S. 260, 267-68 (1954) (Attorney General must
25 abide by regulations and cannot dictate immigration board's
26 exercise of discretion in decision on application to suspend

1 deportation; remedy is new hearing where board will exercise it's
2 discretion free from bias).

3 Concomitant to the guarantee against arbitrary and
4 capricious state action is the right to a fact-finder who has not
5 predetermined the outcome of a hearing. See Withrow v. Larkin,
6 421 U.S. 35 (1975) (a fair trial in a fair tribunal is a basic
7 requirement of due process, and this rule applies to
8 administrative agencies which adjudicate as well as to courts);
9 Edwards v. Balisok, 520 U.S. 641 (1997) (recognizing due process
10 claim based on allegations that prison disciplinary hearing
11 officer was biased and would suppress evidence of innocence);
12 Bakalis v. Golembeski, 35 F.3d 318, 326 (7th Cir. 1994) (a
13 decision-making body "that has prejudged the outcome cannot
14 render a decision that comports with due process").

15 Courts too numerous to list have recognized that the right
16 to a disinterested decision-maker, who has not prejudged the
17 case, is part of the fundamental guarantee against arbitrary and
18 capricious government conduct ~~in California~~.
19 See, e.g., Rosenkrantz, 29 Cal. 4th at 677 (parole decision "must
20 reflect an individualized consideration of the specified criteria
21 and cannot be arbitrary and capricious"); In re Ramirez, 94 Cal.
22 App. 4th 549, 563 (2001) ("some evidence" standard is "only one
23 aspect of judicial review for compliance with minimum standards
24 of due process" (citing Balisok) and Board violates due process
25 if its decision is "arbitrary and capricious"); In re Minnis, 7
26 Cal. 3d 639 (1972) (blanket no-parole policy as to certain

1 category of prisoners is illegal); In re Morrall, 102 Cal. App.
2 4th 280 (2003) (same). The guarantee of neutral parole officials
3 in a suitability hearing is just as fundamental as the right to a
4 neutral judge in a court proceeding. Compare Sellars v.
5 Procunier, 641 F.2d 1295 (9th Cir. 1981) (holding that California
6 parole officials, analogous to judges, are entitled to absolute
7 immunity).

8 The Ninth Circuit previously has acknowledged California
9 inmates' due process right to parole consideration by neutral
10 decision-makers. See O'Brenski v. Maas, 915 F.2d 418, 422 (9th
11 Cir. 1990). In that case the appellate court found that a
12 neutral parole panel at a new hearing would reach the same
13 outcome and so denied relief. The record in this case simply
14 will not permit the same conclusion. The requirement of an
15 impartial decision-maker transcends concern for diminishing the
16 likelihood of error. As the Supreme Court clearly held in
17 Balisok a decision made by a fact-finder who has predetermined
18 the outcome is per se invalid -- even where there is ample
19 evidence to support it. 520 U.S. at 648.

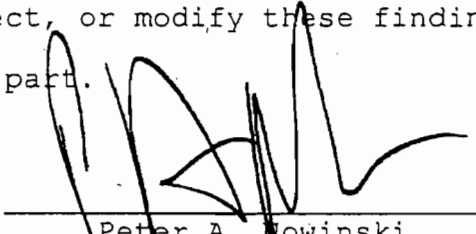
20 Petitioner presents a convincing case that a blanket policy
21 against parole for murderers prevented him from obtaining a
22 parole suitability determination made after a fair hearing.
23 Respondent offers nothing to counter petitioner's showing.

24 Accordingly, the court hereby recommends that the petition
25 for habeas corpus be granted unless, within 60 days of the
26 district court's adoption of these recommendations, respondent

1 provides a fair parole suitability hearing, conducted by a board
2 free of any prejudice stemming from a gubernatorial policy
3 against parole for murderers.

4 Pursuant to the provisions of 28 U.S.C. § 636(b)(1), these
5 findings and recommendations are submitted to the United States
6 District Judge assigned to this case. Within 20 days after being
7 served with these findings and recommendations, respondent may
8 file written objections. The document should be captioned
9 "Objections to Magistrate Judge's Findings and Recommendations."
10 The district judge may accept, reject, or modify these findings
11 and recommendations in whole or in part.

12 Dated: DEC 21 2004.



13 Peter A. Nowinski
14 Magistrate Judge
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